Supreme Court, U.S.
FILED

02 1741 MAY 27 2003

OFFICE OF THE CLERK

No. 02-

IN THE

Supreme Court of the United States

REGINA D. MCKNIGHT,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

PETITION FOR A WRIT OF CERTIORARI

LYNN M. PALTROW
NATIONAL ADVOCATES FOR PREGNANT WOMEN
153 Waverly Place
6th Floor
New York, NY 10014
(212) 475-4218

DAVID T. GOLDBERG
Counsel of Record
99 Hudson Street
8th Floor
New York, NY 10013
(212) 334-8813

C. RAUCH WISE
ACLU OF SOUTH CAROLINA FOUNDATION, INC.
305 Main Street
Greenwood, SC 29646
(864) 229-5010

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether a State Supreme Court offended the Due Process Clause by construing a statute proscribing "homicide by child abuse" – a felony that carries a twenty-year-to-life sentence – to punish a woman who intended to carry her pregnancy to term, but instead suffered a stillbirth, when (1) the State's legislature classified a woman's intentional termination of a pregnancy after fetal viability as a misdemeanor, carrying a maximum two-year sentence; (b) the legislature that unanimously enacted the homicide statute had rejected proposals that would have punished pregnant women who risked fetal harm; and (c) convicting a woman for homicide based on pregnancy loss is wholly without precedent in Anglo-American law?

2. Whether a statute construed to authorize life imprisonment for women who suffer stillbirths when fetal demise is attributed to acts or inaction "publicly know[n]" to be "potentially fatal" is void for vagueness, in view of the innumerable types of conduct, conditions, and circumstances associated with the stillbirth risks and the likelihood that the statute will be enforced in an arbitrary way?

3. Whether a statute that relies on imposition of criminal punishment in the event of stillbirth to regulate women's lives while pregnant unconstitutionally infringes on fundamental autonomy interests?

4. Whether the South Carolina Supreme Court's affirmance of Petitioner's criminal conviction is consistent with the principles established in *Jackson v. Virginia*, 443 U.S. 307 (1979)?

5. Whether, in view of unbroken common law tradition and the uniform contrary judgment of State courts and legislatures, the Eighth Amendment allows a court to punish a pregnant woman as a murderer based on a finding that her conduct or circumstances contributed to a stillbirth?

Table of Contents

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

1. Facts And Trial Proceedings 3

2. The South Carolina Supreme Court Decision ... 6

REASONS FOR GRANTING THE PETITION 10

I. The State Supreme Court's Decision Is Irreconcilable with this Court's Due Process Precedents 11

A. Petitioner's Conviction under the Homicide Law Was Neither Expected Nor Defensible 11

B. As Construed, The Statute Is Void For Vagueness 21

C. As Judicially Expanded, The Statute Violates Substantive Due Process Limitations .. 27

D. The South Carolina Supreme Court's Decision Conflicts With *Jackson v. Virginia* 29

II. Petitioner's Punishment Is Cruel And Unusual ... 30

Conclusion 30

Table of Authorities

Federal Cases

Arnold v. Bd. of Educ.,
880 F.2d 305, 311 (11th Cir. 1989) 28

Atwater v. Lago Vista, 532 U.S. 318 (2001) 26

BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) 17

Bouie v. City of Columbia,
378 U.S. 347 (1964) 11, 12, 15, 17

Burns v. Alcala, 420 U.S. 575 (1975) 14

Butler v. South Carolina, 459 U.S. 936 (1982) (mem.) .. 29

City of Chicago v. Morales, 527 U.S. 41 (1999) 17, 21

Cleveland Bd. of Educ. v. LeFleur, 414 U.S. 632 (1974) . 28

Coalutti v. Franklin, 439 U.S. 379 (1979) 24

Douglas v. Buder, 412 U.S. 430 (1973) (per curiam) ... 17

Enmund v. Florida, 458 U.S. 782 (1982) 30

Ferguson v. City of Charleston,
532 U.S. 67 (2001) 3, 9, 10, 28

Hoffman Estates v. Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982) 17

Jackson v. Virginia, 443 U.S. 307 (1979) 3, 29

Kolender v. Lawson, 461 U.S. 352 (1983) 21, 25

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 26

Papachristou v. Jacksonville, 405 U.S. 156 (1972) ... 2,27

Penry v. Lynaugh, 492 U.S. 302 (1989) 30

Planned Parenthood, S.E. Pa. v. Casey,
505 U.S. 833 (1992) 27, 28

Robinson v. California, 370 U.S. 660 (1962) 30

Rogers v. Tennessee, 532 U.S. 451 (2001) 12

Skinner v. Oklahoma, 316 U.S. 541 (1942) 27

Smith v. Goguen, 415 U.S. 566(1974) 11, 27

Stenberg v. Carhart, 530 U.S. 914 (2000) 28

Thornhill v. Alabama, 310 U.S. 88 (1940) 27

UAW v. Johnson Controls, 887 F.2d 871 (7th Cir. 1989)
(*en banc*), *rev'd*499 U.S. 187 (1991) ..... *passim*

United States v. Lanier, 520 U.S. 259 (1997) 10, 11

United States v. X-Citement Video, Inc,
513 U.S. 64 (1994) 14

In re Winship, 397 U.S. 358 (1970) 29

State Cases

Alaska v. Johnson, 720 P.2d 37 (1986) 19

Collins v. Texas, 890 S.W.2d 893 (App. 1994) 15

Davis v. Arkansas, 925 S.W.2d 768 (1996) 18, 19

Florida v. Ashley, 701 So. 2d 338 (1997) 12, 14, 15, 16

Georgia v. Luster, 419 S.E.2d 32 (App. 1992) 16

Simmons v. Alabama, 649 So.2d 1282 (1994) 19

In re Starks,18 P.3d 342 (Okl. 2001) 14

Johnson v. Florida, 602 So. 2d 1288 (1992) 16

Kansas v. Robinson, 934 P.2d 38 (1997) 19

Kentucky v. Welch, 864 S.W.2d 280 (1993) 16

Michigan v. Hardy, 469 N.W.2d 50 (1991) 16

New Jersey v. Jenkins, 812 A.2d 1143 (2003) 19

New York v. Sanchez, 777 N.E.2d 204 (2002) 19

Ohio v. Gray, 584 N.E.2d 710 (1992) 16

Reinesto v Superior Court,
894 P.2d 733 (Ariz. App. 1995) 22, 24

Sheriff, Washoe County v. Encoe,
885 P.2d 596 (Nev. 1994) 16

Short v. Indiana, 564 N.E.2d 553 (App. 1991) 29

Stallman v. Youngquist,
531 N.E.2d 355 (Ill. 1988) 15, 16, 27

South Carolina v. Ard, 332 S.C. 370,
505 S.E.2d 328 (1998) 6, 13

South Carolina v. Horne,
282 S.C. 444, 319 S.E.2d 703 (1984) 6, 15

South Carolina v. Jarrell, 350 S.C. 90
564 S.E.2d 362 (Ct. App. 2002) 6, 18, 20

Whitner v. South Carolina,
328 S.C. 1, 492 S.E.2d 777 (1997) ..... *passim*

Wisconsin v. Hauk, 652 N.W.2d 393 (App. 2002) 29

Wyoming v. Osmus, 276 P.2d 469 (1954) 12, 15

Young v. Georgia, 530 S.E.2d 758 (App. 2000) 29

Federal Constitution Statutes And Rules

U.S. Const. amend. VIII 1, 30

U.S. Const. amend. XIV ..... *passim*

15 U.S.C. § 1333(a)(1) 22

28 U.S.C. § 1257(a) 1

U.S.S.G. § 2.D.1.3 13

State Statutes

Ark. Code § 5-10-101(a)(9) 21

S.C. Code § 16-3-10 30

S.C. Code § 16-3-30 25

S.C. Code § 16-3-60 18

S.C. Code § 16-3-85 ..... *passim*

S.C. Code § 44-41-10 10

S.C. Code § 44-41-20 10

S.C. Code § 44-41-80 ..... *passim*

Other Authorities

J. DiFranza & R. Lew, *Effect of Maternal Cigarette Smoking on Pregnancy Complications and Sudden Infant Death Syndrome*, 40 J. FAM. PRAC. 385 (1995) 22

D. Frank *et al.*, *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613 (2001) 20, 21

Jeffries, Legality, Vagueness, and the Construction of Penal Statutes, 71 VA. L. REV. 189 (1985) 11, 25

MODEL PENAL CODE 18

E. Rafshoon, *What Price Beauty?*, *Boston Globe Magazine* (April 27, 2003) 18

G. Richardson, et al., *Prenatal Cocaine Exposure: Effect on the Development of School Age Children* 18 NEUROTOXICOL TERATOLOGY 627 (1996) 21

M. Sims & K. Collins, *Fetal Death: A 10-Year Retrospective Study*, 22 AM. J. FORENSIC MED. & PATH. 261 (2001) 21

B. Steinbock, *The McCaughey Septuplets: Medical Miracle or Gambling with Fertility Drugs?*, in ETHICAL ISSUES IN MODERN MEDICINE 375 (5th ed., J. Arras & B. Steinbock, eds 1999) 23

S. Tough, *et al.*, *Delayed Childbearing and Its Impact on Population Rate Changes in Lower Birthweight, Multiple Birth, and Preterm Delivery*, 109 PEDIATRICS 399-403 (March 2002) 23

Validity and Construction of "Extreme Indifference" Murder Statute, 7 A.L.R. 5th 758 (1992) 20

K. Wisborg *et al.*, *Exposure to Tobacco Smoke in Utero and the Risk of Stillbirth and Death in the First Year of Life*, 154 AM. J. EPIDEMIOLOGY 322 (2001) 22

OPINIONS BELOW

The decision of the South Carolina Supreme Court is reported at 576 S.E.2d 168, 352 S.C. 635, and reprinted in the appendix at 1a-22a.

JURISDICTION

The Supreme Court of South Carolina entered judgment on January 27, 2003. Chief Justice Rehnquist entered an order extending the time to file to May 27, 2003. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

S.C. Code § 16-3-85

S.C. Code § 44-41-80

U.S. Const. amend. XIV

U.S. Const. amend. VIII

The text of these provisions is set out in the appendix.

STATEMENT OF THE CASE

Petitioner seeks review of a judgment that is wholly unknown to our Nation's legal tradition: a *homicide* conviction – and twenty-year sentence – imposed on a woman for delivering a stillborn child, based on a finding (erroneous, on the facts of this case) that her activity while pregnant contributed to the fetal demise.

Petitioner's conviction was not the result of a State legislature's decision to enact a new or radically different type of penal law. Rather, it was the consequence of the decision, by a bare majority the South Carolina Supreme Court, to expand the sweep of the State's straightforward and uncontroversial "homicide by child abuse" statute, in the face of compelling evidence that the State's legislature could not have meant that statute to punish women who unintentionally heighten the risk of stillbirth, as guilty of "depraved heart" homicide.

The South Carolina Supreme Court's decision cannot be reconciled with the principles laid down in this Court's Due Process cases. First, the Constitution does not permit a conviction that depends, as does Petitioner's, on an unprecedented and indefensible construction of a State's criminal law.

Moreover, the interpretation now imposed on the South Carolina statute – whereby conviction is permitted on any evidence that a pregnant woman engaged in activity "public[ly] know[n]" to be "potentially fatal" to a fetus – offends other fundamental Due Process norms. In view of the vast range of conditions, circumstances, and actions known to heighten fetal risk – and the substantial limitations on even medical experts' understanding of pregnancy loss – pregnant women in South Carolina are left without any reliable basis for determining whether, in the event of stillbirth, they could be punished, with life imprisonment, for "homicide."

This Court's Due Process cases teach that it is no answer that the novel construction *may be* limited in future decisions – or to predict that the statute will not likely be enforced against women who suffer stillbirths traced to conduct no less "potentially fatal" than was Petitioner's – but who are not members of "particular groups" who "merit the displeasure of local prosecuting officials," *Papachristou v. Jacksonville,* 405 U.S. 156, 170 (1972). That an open-ended criminal statute will be enforced selectively, based on criteria unrelated to its stated rationale, is not a *defense* to unconstitutionality, but rather the prime reason for declaring it void.

To conceive of the rule's being enforced even-handedly, meanwhile, *i.e.*, as treating women who suffer stillbirth as "depraved heart" murderers in every case in which fetal demise is attributed to some act or omission "publicly known" (even if not by them) to have heightened that risk, is to see how seriously it breaches the *substantive* limitations that Due Process imposes. The concept of liberty recognized

in this Court's cases does not permit a State to assert broad regulatory authority over pregnant women's life activities – let alone a regime that relies on retrospective imposition of criminal liability. And it is difficult to imagine a more serious infringement on reproductive autonomy than a regime that threatens those women who carry pregnancies to term with life imprisonment, in the event of stillbirth.

Two additional ironies loom over this case. First, the evidence against Petitioner was so weak and doubtful that the South Carolina Supreme Court could not have reached the unprecedented result it did, had it not committed a further Due Process error: failing to review the verdict under the standard established in *Jackson v. Virginia*, 443 U.S. 307 (1979).

Finally, as this Court has previously noted, it is the subject of essentially universal agreement that regimes such as the one encouraged by the decision below "harm, rather than advance, the cause of prenatal health," *Ferguson v. City of Charleston,* 532 U.S. 67, 84 n.23 (2001) – a judgment reached not only by scores of leading medical and public health organizations, but by every State Legislature to have seriously considered the matter – *including South Carolina's.*

1. Facts And Trial Proceedings

Regina McKnight is a 26-year-old native of Horry County, South Carolina. She has an IQ that, prior to trial, was measured at 72, *i.e.*, "below average/borderline deficiency,"and attended special education classes in high school. She was unable to obtain a permanent job thereafter.

Until 1998, Petitioner lived with her mother, who helped her with day-to-day needs. In 1998, however, Petitioner's mother was killed by a hit and run driver. Left without the support system on which she had relied, she quickly spiraled downward, becoming homeless, addicted to both cocaine and marijuana – and pregnant. Lacking access to an adequate substance abuse treatment program, she was unable to overcome her drug dependence.

On May 15, 1999, McKnight was transported, in labor, to Conway Hospital, where she delivered a stillborn girl. There had been no prior indication that the fetus was in distress, and it has never been suggested that McKnight intended to harm the fetus. On the contrary, the attending nurse testified at trial to having comforted McKnight, who was grief-stricken by the stillbirth. As is common with distraught parents, Petitioner asked to hold the stillborn baby and requested that photographs of the baby be taken. She told hospital staff of the name – "Mercedes" – that she had picked out for the baby. She asked to be given a "memory certificate" with the baby's footprints and the bracelet that the baby had worn. She also asked to see the hospital's chaplain.

Within minutes of the stillbirth, however, hospital staff assumed a second role. Following a carefully developed "protocol," they obtained a urine sample from McKnight, for drug testing. After that screen indicated that cocaine was present, a nurse, following the protocol, obtained McKnight's signature on a form entitled "Informed Consent for Drug Testing," and collected a second sample for "forensic" testing, with positive results reported to the State Department of Social Services ("DSS").[1]

McKnight was arrested on October 7, 1999, and charged under a statute proscribing "homicide by child abuse," S.C. Code § 16-3-85, which makes it a felony to "cause[] the death of a child under the age of eleven while committing child abuse or neglect," if the death occurs "under circumstances manifesting an extreme indifference to human life." The law provides for a prison sentence of twenty years to life. *Id.* § 16-3-85(C). *See* 24a.[2]

---

[1]The hospital had a "chain of custody" form and a set of procedures for handling "forensic" samples, *see* Record on Appeal 455 (cited hereafter as "R._"). The protocol describes the purpose of notifying DSS as discharging the hospital's legal "obligation * * * to report * * * any suspected abuse or neglect involving an unborn, yet viable, fetus or newborn child," R. 452.

[2]Petitioner was also indicted for "distributing drugs" to the fetus The

Prior to trial, Petitioner moved to have the charges dismissed, on grounds: (1) that the homicide statute could not be interpreted as authorizing punishment of women for "causing" stillbirth; (2) that giving the statute that unprecedented interpretation would violate Due Process; and (3) that punishing women who deliver stillborn children with life imprisonment would unconstitutionally infringe liberty interests and constitute cruel and unusual punishment. *See* R. 4-35. Petitioner also sought dismissal on the ground that the prosecution could not establish the causation and intent elements of the offense, because (1) the inference of a causal link between cocaine ingestion and the stillbirth *in her case* was medically untenable and (2) there was no evidentiary basis for accusing her of exhibiting "extreme indifference to human life." The trial court denied each of these motions. R.70.[3]

At trial, the State made no effort to show that Petitioner intended harm to the fetus; that she was aware of the risk that cocaine use would result in stillbirth; or that that risk is, in fact, a large or substantial one. Rather, in its opening statement, the prosecution defined its burden strictly in terms of causation, telling the jury that if "you in fact find that cocaine killed the child you must return a guilty verdict," and confined its case to (1) evidence that Petitioner's urine had tested positive for cocaine and that cocaine metabolites had been found in a fetal blood sample; and (2) testimony by two pathologists that cocaine had contributed to fetal demise.

These witnesses conceded that children exposed to similar quantities cocaine were born alive, and, that neither placental abruption nor membrane rupture – two conditions found in cocaine-associated pregnancy loss – was present.

---

trial court directed a verdict of acquittal on that count, and the State Supreme Court dismissed the State's appeal from that judgment. *See* 353 S.C. 238, 577 S.E.2d 456.

[3]"Petitioner expressly renewed these pretrial motions at later stages of the trial, *see* R. 323 (at close of State's case), R. 368 (at close of evidence).

They also confirmed that other conditions from which Petitioner suffered – hyperthyroidism and syphilis – are strongly linked to stillbirth, as have been tobacco use and poor nutrition. The pathologist who had performed the fetal autopsy acknowledged having listed cocaine as one of three causes of fetal demise and that the other two, chorioamnionitis and funisitis could cause stillbirth, in and of themselves.

After denying Petitioner's directed verdict motion, the case was submitted to the jury. The court's instruction (to which Petitioner's trial counsel did not object) tersely stated that it was the State burden's to prove "extreme indifference to human life" beyond reasonable doubt, but then proceeded with a lengthy explanation of "criminal intent," telling jurors that "intent," which "must be proven" in every case, "may arise from negligence, recklessness, or indifference." R.377. When the jury sent a note seeking further guidance on the mental state element, R.381, the court (without objection) re-read this generic definition, indicating again that the requisite mental state "for a particular crime" could be "purpose, intent, knowledge, recklessness, or criminal negligence," R.382. The jury then returned a guilty verdict, and the court denied Petitioner's motion for judgment notwithstanding the verdict.

After hearing argument from McKnight's trial counsel concerning Petitioner's lack of prior criminal record, her developmental disability, her homelessness and inability to obtain treatment for her drug dependency, the court sentenced McKnight to twenty years imprisonment, with the final eight years suspended – telling her that "at least with [twelve] years hopefully you can get beyond this substance problem that you have and no other [sic] be a threat to yourself or to any children that you might carry," R.391-92.

2. The South Carolina Supreme Court Decision

A sharply divided State Supreme Court affirmed McKnight's conviction and sentence. Rejecting arguments that the unprecedented interpretation of the homicide

statute had denied her Due Process, the majority opinion explained that "[t]he plain language of the statute" – including a section that enumerates "failing to supply the child with adequate health care" as a basis for filing homicide charges – "did not preclude" applying it in McKnight's case, 9a. The opinion noted prior decisions interpreting the statutory terms "person" and "child" as including a viable fetus, *see* 13a (citing *State v. Ard*, 332 S.C. 370, 505 S.E.2d 328 (1998); *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984)), placing special emphasis on the decision in *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997), in which a similarly divided court had denied post-conviction relief to a defendant who had pleaded guilty to misdemeanor child endangerment, based on cocaine use while pregnant.

After alluding to the intense criticism to which the *Whitner* decision has been subjected (and noting that McKnight had been granted leave to argue against it), the majority announced that it had decided to adhere to *Whitner*. *See* 10a n.5. The court held that, like the defendant in that case, McKnight "'had all the notice the Constitution requires,'"13a – because, as in *Whitner*, (1) "'the plain meaning of 'child' * * * includes a viable fetus'" and (2) "'it is common knowledge that use of cocaine during pregnancy can harm the viable unborn child,'" 7a (quoting *Whitner*, 328 S.C. at 16). While the majority opinion acknowledged that South Carolina has a penal statute that expressly addresses a woman's intentional termination of pregnancy after fetal viability – which is classified as a misdemeanor punishable by a maximum two-year sentence, *see* S.C. Code § 44-41-80 – it did not see that provision as bearing on whether Petitioner had fair notice that she could be convicted under the homicide statute for conduct that unintentionally resulted in fetal demise.[4]

---

[4]Although Petitioner had argued to the trial court that her prosecution under § 16-3-85 could not be reconciled with the legislative judgments reflected in § 44-41-80, *see, e.g.*, R. 30, 64, the decision below saw the abortion statute as only relevant to claims (1) that Petitioner *should have been prosecuted* under that statute and (2) her punishment

The court then stated that there was no need to decide whether construing § 16-3-85, to authorize punishment based on women's actions or inactions while pregnant would render it void for vagueness. While it might be "unclear what conduct by a pregnant woman is likely to result in the stillbirth of her fetus," the majority reasoned, "the statute clearly applies to a stillbirth caused by ingestion of cocaine," 13a n.6.

The decision also addressed the element of "extreme indifference to human life." Rejecting arguments that the Prosecution was required to establish that McKnight "knew the risk that her use of cocaine could result in the stillbirth of her child," 6a, – or at least to present evidence concerning "how likely cocaine is to cause stillbirth," *id.* – the court, quoting a recent lower court decision, reasoned that "'in the context of homicide by abuse statutes, extreme indifference is a mental state akin to intent characterized by a deliberate act culminating in death,'" 6a.(quoting *State v. Jarrell*, 350 S.C. 90, 97, 564 S.E.2d 362, 366 (Ct. App. 2002)). In view of this definition – and a review standard it described as limited to determining whether "the State present[ed] any evidence which reasonably tends to prove defendant's guilt, or from which defendant's guilt could be fairly and logically deduced," 8a – the majority concluded that evidence that Petitioner had ingested cocaine knowing she was pregnant was sufficient, in light of "public knowledge," 7a, that cocaine is "potentially fatal," *id.*[5]

The court then rejected Petitioner's arguments that its construction of the statute would violate substantive limits on State power imposed by the Due Process Clause and the Eighth Amendment. The majority first quoted *Whitner*, to

---

violated Equal Protection, and held *these arguments* to have been "waived" by McKnight's not having presented them to the trial court. *See* 9a, 16a.

[5]The court applied the same standard in rejecting Petitioner's contention that the evidence did not support a finding of causation, despite arguments that the medical evidence actually "*contraindicated*" cocaine as a cause of this stillbirth. Br. *Amici Curiae*, of S.C. Medical Association, *et al.* at 9.

the effect:

> If the State wishes to impose additional criminal penalties on pregnant women who engage in this already illegal conduct because of the effect the conduct has on the viable fetus, it may do so. We do not see how the fact of pregnancy elevates the use of crack cocaine to the lofty status of a fundamental right.

14a (quoting 328 S.C. at 18). As for the Eighth Amendment, the majority held that that Petitioner's punishment was not "grossly out of proportion with the severity of the crime," as her sentence was "no harsher than that imposed upon any other individual charged with murder," nor was it more severe than sentences other jurisdictions impose "on those who are guilty of the murder or neglect of a child." 15a.[6]

In a dissenting opinion for himself and Justice Pleicones, Justice Moore faulted the majority for "expand[ing] the application of a criminal statute to conduct not clearly within its ambit," emphasizing that the homicide statute "could not have been intended" to prosecute a woman for causing fetal demise. By "imposing a maximum punishment of two years or a $1,000 fine for the intentional killing of a viable fetus by its mother," Justice Moore underscored, *see* 21a, the State's legislature had "recognized the unique situation of a feticide by the mother," *id.* and the majority's readiness to impose far greater punishment for undeniably less blameworthy conduct was in plain defiance of that legislative judgment.[7]

---

[6]The majority also rejected McKnight's Fourth Amendment claims, distinguishing *Ferguson*, and ruled that any Fourth Amendment error was harmless, in any event.

[7]Justice Moore also referenced his dissent in *Whitner*, which had warned that by "construing this statute to include conduct not contemplated by the legislature, the majority has rendered the statute vague and set for itself the task of determining what conduct is unlawful," 328 S.C. at 22; highlighted the legislature's consideration of numerous "proposed bills addressing the problem of drug use during pregnancy," *id.* at 22; and faulted the majority for ignoring "[t]he only [South Carolina] law, * ** that specifically regulates the conduct of a mother toward her unborn child," *i.e*, the "abortion statute[,] under which a viable fetus is in

REASONS FOR GRANTING THE PETITION

The South Carolina Supreme Court stands alone in the Nation for having sustained a criminal conviction of a woman who experienced a stillbirth and for treating a drug dependency that co-occurred with pregnancy as equivalent to "depraved heart" homicide. Although numerous prosecutions have been attempted under similar circumstances, no court in the Nation, apart from the one below, has sustained a conviction of a pregnant woman under *any* general criminal statute, on the premise that her conduct or circumstances risked or caused harm to the fetus she was carrying. Similarly, every legislature in the Nation to have considered the issues, as many have, has rejected a criminal law approach, and every leading medical, public health and substance abuse treatment organization has condemned such prosecutions in strong terms. *See Ferguson*, 532 U.S. at 84 n.23.

What distinguishes this case from these other judicial decisions is not the content of the South Carolina statute, which, read fairly, *precludes* prosecution under these circumstances – nor the "wishes" of the State's Legislature. Like bodies throughout the Nation, the South Carolina Legislature has, for reasons of public health and respect for individual liberty, rejected approaches far less draconian than the one imposed, through "statutory construction," by the Justices in the majority below.

Under this Court's precedents this application of a "novel construction of a criminal statute" to circumstances not "fairly disclosed to be within its scope," *United States v. Lanier*, 520 U.S. 259, 266 (1997), is itself a denial of Due Process of Law.

But as now authoritatively construed, the statute has so blurred the line separating stillbirth as personal and family tragedy from the felony of "depraved heart" homicide, punishable by life imprisonment – as to require invalidation under void-for-vagueness case law. Like other statutes

---

fact treated differently from a child in being," *id.* at 22.

struck down for vagueness, the South Carolina homicide law, as now construed, leaves "prosecutors[] and juries" – and health care providers, who are called upon to report their patients to State authorities – to pursue their "personal predilections," *Smith v. Goguen*, 415 U.S. 566, 575 (1974), concerning whether any woman or class of women should or should not be subjected to criminal punishment for stillbirth.

Moreover, this Court's *substantive* Due Process precedents do not permit what the statute has been construed to authorize: pervasive State regulation of pregnant women, for the benefit of "future children," through the imposition of onerous criminal penalties in the event of stillbirth. By threatening incarceration for those women who, like Petitioner, seek to carry pregnancies to term, the newly interpreted statute impermissibly infringes on that constitutional right.

Finally, the consequences of the decision ramify beyond the pregnant women and families most directly affected. Doctors, nurses, and substance abuse treatment providers in South Carolina are now also subject to mandates, themselves backed by criminal penalties, which require, in an ill-defined class of cases, that they violate patient confidentiality and turn over to the State "inculpatory" information about their pregnant patients and clients.

Both the gravity of these constitutional errors and their far-reaching effects necessitate this Court's intervention.

I. The State Supreme Court's Decision Is Irreconcilable With This Court's Due Process Precedents

A. Petitioner's Conviction under the Homicide Law Was Neither Expected Nor Defensible

The Due Process Clause forbids States from "applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Lanier*, 520 U.S. at 266; *Bouie v. City of Columbia*, 378 U.S. 347, 361 (1964). Like

vaguely-worded statutes, such decisions deny those punished fair notice, *see* 378 U.S. at 352 (when "uncertainty as to the statute's meaning is * * * not revealed until the court's decision," the violation can be "that much greater"), and they contravene basic rule-of-law norms, *see* Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985).

The decision to construe § 16-3-85 as authorizing Petitioner's conviction was "unexpected and indefensible," *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001) (internal quotation omitted). Neither South Carolina nor any other State with a similar statute has ever convicted a woman who delivers a stillborn child of "homicide by child abuse" for having contributed to fetal demise. Indeed, there appears to be no antecedent in Anglo-American law for punishing a woman for homicide of any sort, on account of conduct during pregnancy that "culminates in" unintended fetal harm. *See Wyoming v. Osmus*, 276 P.2d 469 (1954); *Florida v. Ashley*, 701 So. 2d 338 (1997); *Bouie*, 378 U.S. at 361 (noting that South Carolina Supreme Court's enlargement of trespassing statute was "inconsistent" with "'traditional American law").

As the dissenting Justices of the State Supreme Court emphasized, South Carolina does have a statute that specifically addresses conduct by pregnant women resulting in the demise of a fetus during the third trimester of pregnancy. *See Bouie*, 378 U.S. at 359 n.7 (existence of other statute "dealing specifically" with conduct at issue made construction "all the more untenable"). In relevant part, S.C. Code § 44-41-80(b) provides: "any woman who solicits of any person or otherwise procures any drug, medicine, prescription or substance and administers it to herself * * * with intent to produce an abortion, unless it is necessary to preserve her life, shall be deemed guilty of a misdemeanor."[8]

[8] "Abortion" is defined as "the use of an instrument, medicine, drug, or other substance or device with intent to terminate the pregnancy of a woman known to be pregnant* * * *" S.C. Code § 44-41-10(a); *see also id.* § 44-41-20 (specifying circumstances under which abortion is "legal").

A woman convicted for violating that provision "shall be punished by imprisonment for a term of not more than two years or fined not more than one thousand dollars, or both." *Id.*; *compare id.* § 44-41-80(a) (mandating 2-5 year punishment on "any person" *other than the woman*).

To conclude that a conviction under the general homicide by child abuse statute would be "[]expected and defensible[]" therefore requires assuming that the South Carolina Legislature enacted *two* statutes regulating the ingestion of drugs that lead to late-pregnancy fetal demise: one, § 44-41-80, which expressly addresses a woman's doing so with the *specific intent* of causing fetal demise – and classifies such conduct as a misdemeanor punishable by a two-year sentence – and a second, § 16-3-85, that (without mentioning pregnancy, viable fetuses or ingestion of drugs) treats similar conduct, when leading to *unintended* fetal harm, as a felony punishable by life imprisonment.[9]

While the majority opinion below asserted that a State that "wishe[d] to impose additional criminal penalties on pregnant women who engage in this already illegal conduct because of the effect * * * on [a] viable fetus," could do so, 14a (quoting *Whitner*, 328 S.C. at 18), it is patently clear that the South Carolina Legislature *did not* so intend when it enacted the Homicide by Child Abuse statute in 1992. Nothing in the statutory text hints at a distinction between "already illegal conduct," and harm-causing activity not forbidden by some other statutory provision, *see infra*, let alone indicates that the legislature viewed this statute as one authorizing "additional penalties" for existing crimes based on "the effect * * * on the viable fetus." *Compare, e.g.* U.S.S.G. § 2.D.1.3 (sentence enhancement for offender who sells drugs to pregnant woman).

---

[9]Indeed, the South Carolina Reports attest that the State has taken the extraordinary position (one not inconsistent with the construction in this case) that the Legislature's provision for criminal penalties under the State's abortion statute would not preclude a prosecutor's pursuing a conviction for third-trimester abortion under the *capital murder* statute. *See Ard*, 332 S.C. at 370 (Moore, J. dissenting).

On the contrary, in the very same session at which § 16-3-85 was enacted, the State Legislature vigorously debated – but did not enact – a series of proposed measures that would have expanded the State's laws so as to more closely regulate drug use by pregnant women. *See* S. 75 (1991) (modifying definition of "neglect" in child abuse statute to include infants testing positive for controlled substances); S.79 (1991) (requiring reporting to Department of Social Services of any pregnant woman believed to have used a controlled substance); S. 986 (1991) (requiring drug testing of newborn infants and sterilization or implantation of birth control until the mother of child testing positive had completed drug treatment). It is not merely that these measures failed to pass, but that the Homicide by Child Abuse statute was enacted, by the same legislature that rejected them, with *no dissenting votes*. *See* Senate Journal, May 6-7 & 19, 1992; House Journal, April 2-3, May 20, 1992.

Nor can enlargement of the homicide statute be defended as necessary to avoid the "absurd[ity]," *Whitner*, 328 S.C. at 7, or "inconsisten[cy]," *id.* at 8, of treating viable fetuses as "children" for some statutory purposes, but not others. There is nothing unusual, let alone "absurd," about interpreting the word "child" differently in different statutes. *See United States v. X-Citement Video, Inc*, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting) (absurdity avoidance canon is reserved for cases when it is "absolutely clear," that the legislature "genuinely intended [some result] but inadequately expressed" its intention in statutory language). This Court has observed that ordinarily, "the word 'child * * * refer[s] to an individual already born, with an existence separate from its mother," *Burns v. Alcala*, 420 U.S. 575, 580 (1975), and every State's laws – including South Carolina's – classify fetuses differently depending on the legal context. *See Whitner*, 328 S.C. at 6 ("The question for this Court, therefore, is whether a viable fetus is a 'person' for purposes of the Children's Code"); *id.* at 21 (Finney, C.J., dissenting) (noting 1995 decision interpreting "child" to mean "child in being and not a fetus"); *see also In*

re Starks,18 P.3d 342 (Okl. 2001) (prior case sustaining homicide prosecution for third party offense against viable fetus does not necessitate recognizing fetus as "child" for purposes of State children's code); *Florida v. Ashley*, 701 So. 2d 338 (1997) (precedent upholding third-party's conviction based on gunshot to child *in utero* did not support conviction of pregnant woman who shot herself); *Collins v. Texas*, 890 S.W.2d 893 (App. 1994) (rejecting argument that precedent considering fetuses persons in civil cases gave mother fair notice that she could be prosecuted for criminal child abuse), *Stallman v. Youngquist*, 531 N.E.2d 355, 359 (Ill. 1988) (refusing to recognize a tort of maternal prenatal negligence, notwithstanding case law allowing tort recovery against third parties for fetal harm).[10]

But there is a more specific point: although there is substantial diversity among the laws of the States concerning the legal status of a fetus for particular purposes, no State has ever punished a woman for homicide based on her own experience of a stillbirth. Indeed, at the time the statute was enacted in 1992, *no* State Legislature had defined the term "child" in *any* criminal statute as applying to conduct by a pregnant woman that caused fetal harm, nor had *any* State court of last resort upheld a conviction obtained on that premise. *See Ashley*, 701 So. 2d at 342 (noting "thirty-six cases in twenty-one states" rejecting prosecutions); *cf. Osmus*, 276 P.2d at 475 (finding no precedent at English law for manslaughter conviction based on pregnant woman's failure to obtain medical assistance). And (with the exception of South Carolina) no State has done so since.

---

[10]Indeed, one of the principal decisions cited by the decision below, *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984), *reversed* a defendant's manslaughter conviction for causing the demise of a nine-month fetus, on the ground that "at the time" defendant stabbed his wife, "no South Carolina decision had held that killing of a viable human being *in utero* could constitute a criminal homicide" – and cited *Bouie* for the proposition that Due Process would not allow "the criminal law * * * declared by the courts [to] be applied retroactively." *Id.*

The reasons given in the many judicial decisions refusing to countenance prosecutions of women for conduct while pregnant are directly applicable to this case – and several were presented to the South Carolina Legislature when it rejected the various proposed measures discussed above. Such constructions present intolerable vagueness problems, *see, e.g., Kentucky v. Welch,* 864 S.W.2d 280, 283 (1993) (if "applied to women's conduct during pregnancy, [child abuse statutes] could have an unlimited scope and create an indefinite number of new 'crimes,' * * * render[ing] the statutes void for vagueness"). They threaten women's liberty interests, *see Stallman*, 531 N.E.2d at 359 ("[s]ince anything which a pregnant woman does or does not do may have an impact, either positive or negative, on her developing fetus, any act or omission on her part could render her liable to her subsequently born child"), as well as tragic health consequences. *See Johnson v. Florida*, 602 So. 2d 1288, 1295 (1992) (noting danger that "pregnant women who are substance abusers may simply avoid prenatal or medical care for fear of being detected"); *Georgia v. Luster*, 419 S.E.2d 32, 35 (App. 1992) (rejecting prosecution is "overwhelmingly in accord with the opinions of local and national medical experts").

These other courts have underscored, as did the Justices dissenting below, that drastic changes in long-established rules must originate with the legislative branch:

> This Court cannot abrogate willy-nilly a centuries-old principle of the common law – which is grounded in the wisdom of experience and has been adopted by the legislature – and install in its place a contrary rule bristling with red flags and followed by no other court in the nation.

Ashley, 701 So.2d at 343; *accord Michigan v. Hardy*, 469 N.W.2d 50, 53 (1991); *Ohio v. Gray*, 584 N.E.2d 710, 712 (1992); *Sheriff, Washoe County v. Encoe*, 885 P.2d 596 (Nev. 1994).

Nor, as the decision below asserted, does *Whitner* provide

the answer to Petitioner's Due Process claim. First, while that decision might have made it less unexpected – though no more defensible, *see infra*, – that Petitioner could be prosecuted for *child endangerment*, it surely did not settle that the State's *homicide* law would be interpreted to punish women who "cause" unintended fetal demise with life imprisonment – especially given that those who do so with specific intent are punished as misdemeanants. *See Bouie* 378 U.S. at 358 (petitioners' notice that they were committing *civil* trespass was constitutionally adequate for criminal conviction); *Douglas v. Buder*, 412 U.S. 430 (1973) (*per curiam*); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that State may impose").[11]

Moreover, as the Justices dissenting in *Whitner* forcefully argued, the statutory interpretation in that case introduced vagueness problems of the most serious sort, *see infra*. An already vague decision can not provide fair notice. *See City of Chicago v. Morales*, 527 U.S. 41, 58 (1999) (plurality opinion) (limiting punishment to those disobeying dispersal order did not cure Due Process problem where"police [were] able to decide arbitrarily which members of the public [to] order to disperse"); *accord id.* at 70 (Kennedy, J. concurring).

There is a further, important reason why *Whitner* could not provide Petitioner with Due Process. Sustaining Petitioner's conviction *also* required the majority below to impose a construction on "extreme indifference to human

---

[11]Indeed, before Petitioner's trial, the homicide by child abuse statute was amended, so as *to delete* a cross-reference to the statutory provisions that had been at issue in *Whitner*. While acknowledging this deletion, the majority opinion below characterized the Legislature's "fail[ure]" to have more explicitly "omitted viable fetus from the statute's applicability," as "persuasive evidence that the legislature did not intend to exempt fetuses from the statute's operation." 11a.

life" (a term not part of the *Whitner* statute) that was itself wholly unforeseeable. Indeed, while statutory *mens rea* requirements ordinarily mitigate vagueness problems, see *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982), the South Carolina Supreme Court's unprecedented and indefensible interpretation of the mental state element "compound[ed] the inadequacy of the notice afforded," *Morales*, 527 U.S. at 59, here.

It is uncontested that Petitioner did not *intend* fetal harm, and there was no evidence that, in experiencing a drug dependency and ingesting cocaine, she was aware of, but consciously disregarded, a substantial risk that a stillbirth would result. Indeed, no evidence was presented concerning the magnitude of the risk of stillbirth that cocaine ingestion poses, let alone that it is, in any objective sense, exceptionally high.

In rejecting Petitioner's arguments that she therefore could not have manifested "extreme indifference to human life," the decision below quoted *State v. Jarrell*, which had described an Arkansas decision, *Davis v. State*, 925 S.W.2d 768 (1996), as interpreting "a similar statute," in holding that "'a person acts 'under circumstances manifesting extreme indifference to the value of human life' when he engages in deliberate conduct which culminates in the death of some person,'" *Jarrell*, 350 S.C. at 97, 564 S.E.2d at 366 (quoting *Davis*, 925 S.W.2d at 773). The court then held that evidence that Petitioner had ingested cocaine, despite the "public knowledge," 7a, that doing so is "potentially fatal," *id.*, sufficed.

The "extreme indifference to human life" language, widely associated with § 210.2(1) of the Model Penal Code, has been described as a "statutory formulation of the common-law concept of nondeliberate murder committed with a depraved heart," *Validity and Construction of "Extreme Indifference" Murder Statute*, 7 A.L.R. 5th 758, 772 (1992). And while States adopting the language have imposed different glosses on its meaning, every jurisdiction

that has done so – including South Carolina – punishes homicides committed with "extreme indifference" more harshly than those committed with recklessness or negligence, S.C. Code § 16-3-60 (five-year maximum for manslaughter with "criminal negligence"); *id.* § 56-5-2910 (10-year maximum for reckless homicide), and under no recognized interpretation could (imputed) "public knowledge" that conduct was "potentially fatal" suffice. *See* M.P.C. § 210.2, Comment 4 (defining extreme recklessness as "the *disregard of such a high degree of risk* created by the actor's conduct" that it "cannot fairly be distinguished * * * from homicides committed purposely or knowingly") (emphasis added).

Many jurisdictions have interpreted "extreme indifference" as requiring proof both (1) that the defendant's actions had a high probability of causing death *and* (2) that he or she was aware of and consciously disregarded this risk, *see., e.g., Simmons v. Alabama*, 649 So.2d 1282, 1284 (1994) ("the actor perceives a substantial and unjustified risk, but consciously disregards the risk of death"); *Kansas v. Robinson*, 934 P.2d 38, 48 (1997); *Alaska v. Johnson*, 720 P.2d 37 (1986), and others, while defining the mental state purely in terms of objective risk, have set that standard very high. *See, e.g., New Jersey v. Jenkins*, 812 A.2d 1143 (2003) ("if *the risk of death* is *a probability*, the crime is ["extreme indifference"] manslaughter, if the risk of death is *a possibility*, the crime is [ordinary] manslaughter") (emphasis added); *New York v. Sanchez*, 777 N.E.2d 204, 207 (2002) ("objective circumstances of exceptionally high, unjustified risk of death constitute the primary means" for distinguishing between ordinary recklessness and "extreme indifference").

The cases that the South Carolina Supreme Court cited as relieving the State of the burden of proving either conscious disregard or exceptionally high degree of risk did no such thing. The Arkansas statute applied in *Davis* requires the prosecution to prove (*in addition* to "indifference") that the defendant "knowingly" caused a

child's death, Ark. Code § 5-10-101(a)(9), and *Jarrell* addressed the claim of a defendant – who had *planned* to kill her child – that intent and indifference were logically irreconcilable, by answering that *extreme* indifference is conceptually so "akin to intent," as to defeat that objection. 350 S.C. at 98.

This re-interpretation looms large in this case. First, as emphasized below, that cocaine ingestion may be "potentially fatal," (*i.e.*, increases the risk of stillbirth), does not distinguish it from many other behaviors engaged in and conditions experienced by women while pregnant. And there is no evidence that the prosecution *could have* put on that cocaine is especially likely to bring about stillbirth, let alone that such a link is particularly well known. *See* M. Sims & K. Collins, *Fetal Death: A 10-Year Retrospective Study*, 22 AM. J. FORENSIC MED. & PATH. 261, 264 (2001) (noting that"the direct toxic effect of cocaine on the fetus is not well known," and that in 42 fetal autopsies performed at Medical University of South Carolina, only one case had the cause of death described even as secondary to cocaine toxicity); *cf. UAW v. Johnson Controls*, 499 U.S. 187, 220 (1991) (White, J., concurring in part) (legality of employer's "fetal-protection policy" should depend whether it "insists on a risk-avoidance level substantially higher than other risk levels tolerated"). Indeed, as *Amici* had explained to the South Carolina Supreme Court, the medical evidence strongly indicates that *in utero* exposure to cocaine *did not* cause the stillbirth in this case. *See* n.5 *supra*.

Even worse,"public knowledge" – which the decision below imputed to Petitioner – has proved a notoriously unreliable substitute for actual evidence where the links between cocaine and fetal harm are concerned. As the most careful and comprehensive study to consider the medical evidence concluded:

> [T]here is no convincing evidence that prenatal cocaine exposure is associated with any developmental toxicity difference in severity, scope, or kind from the sequelae

of many other risk factors.

D. Frank, *et al.*, *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613 (2001); *see id.* at 1621 (condemning as "irrational[]" policies that selectively "demonize" *in utero* cocaine exposure and target pregnant cocaine users for special criminal sanction); *cf. Johnson Controls*, 886 F.2d 871, 912 (7th Cir. 1989) (*en banc*), *rev'd*, 499 U.S. 187 (1991) (Easterbrook, J., dissenting) (noting earlier wisdom concerning adverse effect of work on women's 'maternal functions' "turned out to be the triumph of imagination over data").[12]

B. As Construed, The Statute Is Void For Vagueness

By construing § 16-3-85 to authorize punishment of a woman suffering stillbirth based on pregnancy activity "public[ly] know[n]" to be "potentially fatal," the South Carolina Supreme Court rendered the statute void for vagueness. *See Kolender v. Lawson*, 461 U.S. 352, 355 n.4 (1983) ("[f]or the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation we must take the statute as though it read precisely as the highest court of the State has interpreted it") (citations omitted); *Morales*, 527 U.S. at 68 (O'Connor, J., concurring). As construed, the law suffers from the two cardinal defects identified in this Court's vagueness case law: it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" and it "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement." *Morales*, at 56; *see Kolender*, 461 U.S. at 457.

The "line" separating stillbirth as personal and family

---

[12]The JAMA study noted that the oldest group of children studied to date registered *no* effect from *in utero* cocaine exposure on any IQ scales or on academic achievement, *id.* at 1616 (citing G. Richardson, *et al.*, *Prenatal Cocaine Exposure: Effect on the Development of School Age Children* 18 NEUROTOXICOL TERATOLOGY 627 (1996)).

tragedy from stillbirth as "depraved heart" homicide is now wholly obscure to women in South Carolina – with the classification decision delegated to prosecutors (and, indirectly, to health care providers, who decide whether to develop "protocols" to inculpate patients and select which patients to apply them to).[13] *See Reinesto v Superior Court*, 894 P.2d 733 (Ariz. App. 1995) (given variety of "prenatal conduct [that] can harm a fetus," if statute were extended "to prenatal conduct that affects a fetus in a manner apparent after birth – conduct that would be defined solely in terms of its impact on the victim – the boundaries of proscribed conduct would become impermissibly broad and ill-defined").

To take an important example, there is no way of determining whether cigarette smoking – conduct that the Centers for Disease Control estimates 15.1% of pregnant women in South Carolina engage in, *see* http://www.cdc.gov/nccdphp/drh/PrenatalSmkbk – and that is "publicly known," *see* 15 U.S.C. § 1333(a)(1), to be "potential fatal," *see, e.g.*, K. Wisborg, *et al.*, *Exposure to Tobacco Smoke in Utero and the Risk of Stillbirth and Death in the First Year of Life*, 154 AM. J. EPIDEMIOLOGY 322 (2001), can give rise to a homicide conviction.[14]

The grave adverse effects of alcohol are similarly extensively documented and publicly known – as are those of numerous prescription drugs, including anticonvulsants, mood-stabilizers, benzodiazepines (class which includes Valium, Librium and Xanax), some antibacterials (especially

---

[13]The "protocol" in this case centered narrowly around the performance of *drug testing*. No similar policies address the collection of inculpatory evidence – or "chain of custody" precautions necessary for prosecution – in the event of a stillbirth where any prenatal activity other than drug use is suspected.

[14]Although the CDC data specifically attributes 7 South Carolina infant deaths annually to parental smoking, it appears no prosecution has ever been brought. *See also* J. DiFranza & R. Lew, *Effect of Maternal Cigarette Smoking on Pregnancy Complications and Sudden Infant Death Syndrome*, 40 J. FAM. PRAC. 385 (1995) ("Each year the use of tobacco products by women results in the deaths of 19,000 – 141,000 fetuses").

tetracyclines), anticoagulants, and antihypertensive drugs. *See* Br. *Amici Curiae* of South Carolina Med. Ass'n, *et al.* at 16-17 (summarizing studies). Accutane, a popular anti-acne medication has been called "the most widely prescribed birth-defect causing medicine in the United States."[15] Women who take fertility drugs and choose to carry three or more embryos to term often experience pregnancy loss and risk severe, lifelong harm to the children who survive.[16]

"Women ages 35 and older who bear children are at a significantly increased risk of giving birth to low birthweight babies * * * and may have increased risk of stillbirth."[17] So do those – like Petitioner – who suffer from hyperthyroidism and other diseases, and women who work with chemicals or solvents, *See Johnson Controls*, 497 U.S. at 205 ("[e]mployment late in pregnancy often imposes risks on the unborn child"); *see also* 887 F.2d at 914 (Easterbrook, J., dissenting) (an estimated 15 to 20 million jobs entail exposure to chemicals that pose fetal risk). Indeed, while a South Carolina employer would violate federal law if it sought to change a female employee's job assignment to

---

[15] E. Rafshoon, *What Price Beauty?, Boston Globe Magazine* (April 27, 2003), p. 15. Describing confirmed reports of 160 drug-affected births, the article explains that "[s]ome of these children died before they reached their first birthdays because of major organ system failures. The most seriously affected babies have been institutionalized. The rest live with a variety of severe defects, ranging from heart and central nervous system abnormalities to missing or malformed ears, asymmetrical facial features, and mental retardation." *Id.*

[16] B. Steinbock, *The McCaughey Septuplets: Medical Miracle or Gambling with Fertility Drugs?*, in ETHICAL ISSUES IN MODERN MEDICINE 375, 376 (5th ed., J. Arras & B. Steinbock, eds. 1999) ("Even if they are born alive, 'super-twins' (triplets, quadruplets and quintuplets) are 12 times more likely than other babies to die within a year * * * * Many will suffer from respiratory and digestive problems. They are also prone to a range of neurological disorders, including blindness, cerebral palsy and mental retardation").

[17] S. Tough, *et al.*, *Delayed Childbearing and Its Impact on Population Rate Changes in Lower Birthweight, Multiple Birth, and Preterm Delivery*, 109 PEDIATRICS 399-403 (March 2002); March of Dimes, Medical References: Stillbirth, *available at* http://www.marchofdimes.com.

prevent prenatal lead exposure, *see Johnson Controls* – because "[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them," 499 U.S. at 206 – were the employee to suffer a stillbirth, she could be indicted for homicide for having remained on the job.

Indeed, given that the South Carolina statute is broadly addressed to any "act or omission" that causes "harm to the child's physical health or welfare," including "fail[ure] to supply the child with adequate food, clothing, shelter, or health care" – language the majority opinion below indicated "clearly applied" to pregnant women, *see* 9a – it could be invoked to punish a woman for not taking some affirmative step, such as taking vitamins, following a physician's "orders," or accepting medical treatment, such as a blood transfusion or cesarean section. *See, e.g.*, *Reinesto*, 894 P.2d at 736 (noting importance of vitamin intake to fetal development).

To the extent that the statute literally reaches acts or omissions with known "*potential*" to result in stillbirth, the range of activity affected would be essentially limitless. But even if some objective threshold of risk – not to mention one of "public knowledge" – was required, the variables involved are so "numerous" and "imprecise" that leading medical experts would likely not agree in many particular cases. *See Coalutti v. Franklin*, 439 U.S. 379, 396 (1979), Like the statute invalidated on vagueness grounds in *Coalutti*, the South Carolina law imposes "criminal liability for an erroneous determination," *id.*, but it imposes the punishment – for homicide – on a woman who suffered stillbirth.

To the extent that the decision below held that Petitioner's lacked "standing" to raise a vagueness challenge, 13a n.6, because the statute "clearly applie[d]" to her, *id.* – presumably because cocaine was "already illegal,"– it seriously mistook this Court's precedents. Petitioner obviously *has been* aggrieved by what the Court has

identified as the most "important aspect of vagueness doctrine": "the requirement that a legislature establish minimal guidelines to govern law enforcement," *Kolender*, 461 U.S. at 358.

Moreover, in no sense was Petitioner "clearly" violating the homicide by child abuse statute. Although that description might apply in a case where the defendant is charged with physically beating a child to death, even the majority below – which asserted that Petitioner's conviction was "*not preclude[d]*" by the statute – could not fairly claim that a pregnant woman's unintended (and unforeseen) harm to a fetus is at the core of § 16-3-85's prohibitory sweep. *See supra*.

Even more important, the operative terms of the statute, "extreme indifference" and "child abuse" (further defined as "harm to a child's health or welfare") give no indication of applying differently with respect to action legal or illegal under some other statute – just as guilt under the criminal abortion or "killing by poison," statutes, *see* S.C. Code § 16-3-30, does not depend on whether the defendant accomplished his end through use of a substance prohibited under some other law.

Indeed, the facts of Petitioner's case are surely far weaker than in many prosecutions that could be brought under the law, as judicially enlarged. There is no evidence of intent or awareness of risk – which is itself subject to medical uncertainty; and evidence of a causal link, was, at best, scientifically doubtful. Indeed, "deliberate conduct," 6a, is an inapt description for Petitioner's cocaine use, given the court's emphasis on the drug's "highly addictive" properties, 7a.[18]

---

[18]As *Amici* in the court below explained, statistics place South Carolina "last among the states in spending on programs that address the effects of alcohol and drug abuse," and, though an estimated "49,735 women of child-bearing age may need drug or alcohol treatment each year," the State's long-term residential treatment programs can accommodate only about 100 of them. *See* Br. of S.C. Med. Ass'n, *et al.* at 35. The hospital "Protocol for the Management of Drug Abuse During

And while the decision below at points described § 16-3-85 as if it were a law "impos[ing] additional criminal penalties on pregnant women who engage in * * *already illegal conduct," it did not *construe the statute* as excluding from its reach activities not "already illegal." Rather, as in *Lanzetta v. New Jersey*, 306 U.S. 451 (1939):

> The descriptions and illustrations used by the court to indicate the meaning of [the statutory term were] not sufficient to constitute definition, inclusive or exclusive. The court's opinion was framed to apply the statute to the offenders and accusation in the case then under consideration; it [did] not purport to give any interpretation generally applicable.

Id. at 457; *see also Whitner*, 328 S.C. at 22 (Moore, J., dissenting) (when construing a statute, court may not ignore "down-the-road" consequences); Jeffries, 71 VA. L. REV. at 233 (when court is "construing a statute rather than merely deciding a particular case," it should endeavor to "resolve uncertainty [rather than] extend[] it").

Indeed, although cocaine is a controlled substance – and tobacco and alcohol, for example, are not – that cannot be a constitutionally legitimate basis for determining whether homicide liability will attach. First, as a matter of State law, other harm-causing acts *may be* "already illegal" – under the open-ended *Whitner* decision. Moreover, if the burden of the opinion below is that "harm" and "indifference," apply equally to fetuses and children born alive, it cannot be that "legal" conduct, which raises a greater risk of stillbirth, engaged in with more "indifference" than Petitioner was accused of, is beyond punishment.[19]

Thus, commenting about Petitioner's case, the Chief Prosecutor for Horry County declared that "The fact that it

---

Pregnancy," here, R. 450, is tellingly silent with respect to treatment.

[19]Under such a limitation, a woman whose stillbirth could be linked to not wearing a seatbelt could be prosecuted for homicide, *see Atwater v. Lago Vista*, 532 U.S. 318 (2001), while one who took Accutane, knowing that it is terotogenic, could not.

happened to be an illegal substance" was *not decisive:* "Even if a legal substance is used, if we determine you are medically responsible for a child's demise, we will file [homicide] charges." E. Gaston, *Conway Homicide Case Sets Precedent*, *The Sun News* A1 (May 19, 2001).

But if the decision's language is understood as recognizing an empirical reality, *i.e.*, that stillbirths resulting from activity *more* strongly associated with pregnancy loss than was Petitioner's will not be prosecuted as homicides, *see* n.13, *supra*, it is essentially an admission why the statute, as construed, must not stand. Such a regime is an affront to the core concern of vagueness doctrine: that a law not "permit * * * policemen, prosecutors, and juries to pursue their personal predilections," *Smith*, 415 U.S. at 756, or furnish a tool for "'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" *Papachristou*, 405 U.S. at 170 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940); *cf. Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)("When the law lays an unequal hand on those who have committed intrinsically the same quality of offense * * * it has made * * * an invidious discrimination").

C. As Judicially Expanded, The Statute Violates Substantive Due Process Limitations

As construed below, the statute is also in patent violation of the substantive limitations on State power imposed by the Due Process Clause. This Court's cases stand against the notion of broad State authority to regulate women for the benefit of "future children," *Johnson Controls,* 499 U.S. at 211; *Planned Parenthood, Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (Opinion of O'Connor, Kennedy & Souter, JJ.), and as the Illinois Supreme Court stressed in *Stallman*, the connections between a woman's life activities while pregnant and fetal outcomes are such that a rule of *civil liability* for maternal prenatal negligence would, intolerably, place her every "act or omission" under State tort law. 531 N.E.2d at 359. The South Carolina Supreme

Court's regime relies on far more draconian means to accomplish that same impermissible end: imposing *criminal* liability, for *homicide*, on the subset of women who suffer stillbirths (and whom prosecutors single out to charge).[20]

A statute that punishes women for homicide after stillbirth is plainly unconstitutional in a second way: as a violation of the fundamental right to procreate. As *Casey* recognized, the freedom protected in *Roe v. Wade* includes the right to determine to carry a pregnancy to term. 505 U.S. at 859 (citing *Arnold v. Bd. of Educ.*, 880 F.2d 305, 311 (11th Cir. 1989)); *see also Cleveland Bd. of Educ. v. LeFleur*, 414 U.S. 632 (1974) (striking down school district's policy of requiring teachers to take unpaid leave while pregnant). That freedom is incompatible with a regime in which women must do so under the threat of life imprisonment in the event of stillbirth. *Cf.* 505 U.S. at 852 (noting that a woman "who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear").

Indeed, given the breadth of medical consensus that a regime where pregnant women avoid prenatal care, do not confide in their doctors, refrain from seeking substance abuse treatment, or avoid hospital delivery – lest they be subjected to "protocols" of the sort seen here – "harm[s], rather than advance[s], the cause of prenatal health," *Ferguson*, 532 U.S. at 81 n.23, such a rule could not be said even to rationally advance any legitimate State interest.[21]

---

[20]Although the opinion in *Whitner* pointed to *Casey* as the font of authority to regulate activity affecting "viable fetuses," that decision identified viability as the point at which States' interest in potential life suffices to support proscribing *abortion* – a power that is itself not unlimited, *see Stenberg v. Carhart*, 530 U.S. 914 (2000). The lesser power to outlaw abortion in no way establishes the far greater power to regulate all pregnant women's life activities, in the interest of "fetal welfare." *See Johnson Controls*, 887 F.2d at 914 (Easterbrook, J., dissenting) (employer's policy was "redolent of" laws enacted pursuant to ostensible State interest in women's "maternal functions").

[21]Indeed, the prime rationales for judicial deference – dangers of interfering with a legislative policy judgment – do not apply here: the South Carolina Legislature did not conceive of the rule, and it rejected far

D. The South Carolina Supreme Court's Decision Conflicts With *Jackson v. Virginia*

The decision below departs from Due Process in a further way: by failing to assure that Petitioner was accorded the protection of the requirement that guilt be proved beyond reasonable doubt, *In re Winship*, 397 U.S. 358 (1970).

Affirming Petitioner's conviction, the decision below reasoned that when "the State presents any evidence which reasonably tends to prove defendant s guilt, or from which defendant's guilt could be fairly and logically deduced," the jury's verdict of conviction must stand.

But in *Jackson v. Virginia*, 443 U.S. 307 (1979), this Court made clear that "the critical inquiry" in such circumstances is whether, with respect to each offense element, "the record evidence could reasonably support a finding of guilt *beyond a reasonable doubt*," *id.* at 318 (emphasis added). In so holding, *Jackson* underscored that merely requiring any evidence of guilt – a standard then applied by many State appellate courts – would be "inadequate to protect against misapplications of the constitutional standard of reasonable doubt." *Id.* at 320.

While other States have conformed their review standards to this teaching, the South Carolina Supreme Court has failed to implement the "workable[,] * * * predictable standard," announced in *Jackson*. *See Wisconsin v. Hauk*, 652 N.W.2d 393 (App. 2002) ("A conviction cannot be sustained on the sole basis that there is 'some evidence' supporting a guilty verdict; rather, there must be sufficient evidence to enable a reasonable jury to find guilt beyond a reasonable doubt"); *Young v. Georgia*, 530 S.E.2d 758 (App. 2000); *Short v. Indiana*, 564 N.E.2d 553 (App. 1991); *Butler*

---

less sweeping measures when proposed. Indeed, if some South Carolina women, finding themselves unable to overcome drug dependency late in pregnancy, opt to risk misdemeanor punishment under the abortion statute, rather than life imprisonment for homicide, in the event of stillbirth, the law the Legislature actually enacted will have been defeated by the rule the State Supreme Court majority in this case imposed.

v. South Carolina, 459 U.S. 932, 936 (1982) (Marshall, J., dissenting from denial of certiorari) (use of "[a]ny evidence direct or circumstantial reasonably tending to prove the guilt of the accused" standard was inconsistent with this *Jackson*). In view of the conflict that persists on this federal question – and because proper application of *Jackson* would have resulted in reversal of Petitioner's conviction, this error supplies additional reason for granting certiorari.

II. Petitioner's Punishment Is Cruel And Unusual

Petitioner's lengthy prison sentence – for an unprecedented "crime" (that she likely did not "commit") – also violates the Eighth Amendment. Although the decision below reasoned that Petitioner's punishment was not out of proportion to sentences elsewhere imposed for "murder," 15a, that is not an appropriate answer when *every other jurisdiction to have considered the question* would not treat Petitioner's conduct as a *criminal offense*. *See Robinson v. California*, 370 U.S. 660, 667 (1962) ("questions of [cruel and unusual punishment] cannot be considered in the abstract"); *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures"). Indeed, *South Carolina*'s laws maintain longstanding distinctions between intentionally killing a born person, S.C. Code § 16-3-10, and intentionally terminating a pregnancy after a fetus has attained viability, *id.* § 44-41-80(b).

For similar reasons, Petitioner's punishment cannot be defended with reference to the "harm caused." South Carolina has specified that *intentionally* causing the *same harm* merits a maximum sentence one-sixth that imposed on Petitioner, who was convicted (wrongly, *see supra*) of "indifference." *Cf. Enmund v. Florida*, 458 U.S. 782, 800 (1982) ("American criminal law has long considered a defendant's intention – and therefore his moral guilt – to be critical to the degree of [his] criminal culpability").

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

LYNN M. PALTROW
National Advocates for
Pregnant Women
153 Waverly Place, 6th Fl.
New York, NY 10014
(212) 475-4218

DAVID T. GOLDBERG
Counsel of Record
99 Hudson Street, 8th Fl.
New York, NY 10013
(212) 334-8813

C. RAUCH WISE
ACLU of South Carolina
Foundation, Inc.
305 Main Street
Greenwood, SC 29646
(864) 229-5010

Attorneys for Petitioner

MAY 2003

APPENDIX

(Cite as: 352 S.C. 635, 576 S.E.2d 168)

Supreme Court of South Carolina.

The STATE, Respondent,

v.

Regina D. McKNIGHT, Appellant.

No. 25585.

Heard Nov. 6, 2002.

Decided Jan. 27, 2003.

C. Rauch Wise, of Greenwood, Jodie L. Kelley, Matthew Hersh, Oliver A. Sylvain, all of Washington, and Lynn M. Paltrow, of New York, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Charles H. Richardson, Senior Assistant Attorney General Norman Mark Rapoport, all of Columbia, and John Gregory Hembree, of Conway, for respondent.

Joseph M. McCulloch, Jr., of Columbia, Judith K. Appel and Daniel N. Abrahamson, of Oakland, Susan King Dunn, of Charleston, and William S. Bernstein, of New York, for amicus curiae.

JUSTICE WALLER:

Appellant, Regina McKnight was convicted of homicide by child abuse; she was sentenced to twenty years, suspended upon service of twelve years. We affirm.

FACTS

On May 15, 1999, McKnight gave birth to a stillborn five-pound baby girl. The baby's gestational age was estimated to be between 34-37 weeks old. An autopsy revealed the presence of benzoylecgonine, a substance which is metabolized by cocaine. The pathologist, Dr. Proctor,

testified that the only way for the infant to have the substance present was through cocaine, and that the cocaine had to have come from the mother.[1] Dr. Proctor testified that the baby died one to three days prior to delivery. Dr. Proctor determined the cause of death to be intrauterine fetal demise with mild chorioamnionitis, funisitis.[2] and cocaine consumption. He ruled the death a homicide. McKnight was indicted for homicide by child abuse. A first trial held Jan. 8- 12, 2002 resulted in a mistrial.[3] At the second trial held May 14-16, 2001, the jury returned a guilty verdict. McKnight was sentenced to twenty years, suspended to service of twelve years.

ISSUES

1. Did the Court err in refusing to direct a verdict on the grounds that a) there was insufficient evidence of the cause of death, b) there was no evidence of criminal intent, and c) there was no evidence the baby was viable when McKnight ingested cocaine?

2. Did the Court err in refusing to dismiss the homicide by child abuse indictment on the grounds that a) the more specific criminal abortion statute governs, b) the statute does not apply to the facts of this case, and c) the legislature did not intend the statute to apply to fetuses?

3. Does application of the homicide by child abuse statute to McKnight violate her due process right of adequate notice?

---

[1]He testified that because of the rapid breakdown of pure cocaine, a baby would always have benzoylecgonine in its system, rather than pure cocaine.

[2]He testified that chorioamnionitis and funisitis is the medical term given to the placenta and umbilical cord when they are inflamed, which can be caused by an underlying infection, but that most children with these conditions have live births.

[3]McKnight was also indicted for distribution of cocaine. The court dismissed the distribution charge. A separate appeal from that ruling remains pending in this Court.

4. Does application of the homicide by child abuse statute to McKnight violate her constitutional right to privacy?

5. Did the trial court err in refusing to dismiss the indictment on eighth amendment cruel and unusual punishment grounds?

6. Does application of the homicide by child abuse statute to McKnight violate equal protection?

7. Did the trial court err in refusing to exclude evidence of the results of a urine specimen taken from McKnight shortly after the stillbirth, on grounds that the specimen was obtained in violation of her fourth amendment rights?

1. DIRECTED VERDICT

McKnight asserts the trial court erred in refusing to direct a verdict for her on the grounds that a) there was insufficient evidence of the cause of death, b) there was no evidence of criminal intent, and c) there was no evidence the baby was viable when McKnight ingested the cocaine. We disagree.

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. *State v. McHoney,* 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). In reviewing a motion for directed verdict, the trial judge is concerned with the existence of the evidence, not with its weight. *State v. Mitchell,* 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000). On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. *State v. Burdette,* 335 S.C. 34, 46, 515 S.E.2d 525, 531 (1999). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury. *State v. Pinckney,* 339 S.C.

346, 529 S.E.2d 526 (2000).

a. Cause of Death

McKnight asserts the state failed to introduce sufficient evidence demonstrating that cocaine caused the stillbirth. We disagree.

Dr. Proctor, who performed the autopsy and who was qualified as an expert in criminal pathology, testified that the only way for the infant to have benzoylecgonine present was through cocaine, and that the cocaine had to have come from the mother. Dr. Proctor determined the cause of death to be intrauterine fetal demise with mild chorioamnionitis, funisitis and cocaine consumption. Dr. Proctor ruled the death a homicide.

Another pathologist, Dr. Woodward, who was qualified as an expert in pediatric pathology testified that the gestational age of the infant was between 35-37 weeks, and that it was viable. He then described how one determines the cause of death of a viable fetus, by looking for abnormalities, placental defects, infections, and the chemical constituency of the child. He explained the effect that cocaine would have on both an adult and a child. He testified that the placenta was the major heart-lung machine while the baby was in utero and that cocaine usage can produce degeneration of the small blood vessels in the placenta. He stated that he found areas of pinkish red degeneration of the blood vessels which were consistent with cocaine exposure. He testified that he did not see any other indications of the cause of death, and found a lack of evidence of other infections, lack of other abnormalities, otherwise normal development of the child, it's size, weight, and lung development. Although Dr. Woodward agreed with Dr. Proctor that chorioamnionitis and mild funisitis were present, he testified that to a reasonable degree of medical certainty, those conditions had not caused the death of the infant. He also opined that neither syphilis, nor placental

abruption killed the infant. He concluded that, to a reasonable degree of medical certainty, the cause of death was intrauterine cocaine exposure. Although Woodward could not say the exact mechanism by which the cocaine had killed the infant, he testified the mechanisms through cardiac function, placental functions, are seen as most probable. On cross-exam, Woodward testified that he believed the death was caused solely by the cocaine effect, and that the drugs could have caused the baby's heart to stop, or to have caused the baby's heart to rise precipitously putting the baby in congestive heart failure. He explained the lack of abnormalities in the heart found by Dr. Proctor's autopsy, stating, I wouldn't expect to see specific indices in the heart if the heart just stopped or if the heart went into congestive heart failure. Finally, Woodward testified he had seen both children and adults dead with less benzoylecgonine in their systems than McKnight's baby.

Although McKnight's expert, Dr. Conradi, would not testify that cocaine had caused the stillbirth, she did testify that cocaine had been in the baby at one point. She also ruled out the possibility of chorioamnionitis, funisitis or syphilis as the cause of death.

Viewing the expert testimony in the light most favorable to the state, we find sufficient evidence to withstand a directed verdict. *McHoney, supra.* Any defect in the expert testimony went to its weight, a defect McKnight was free to challenge with her own evidence.

b. Criminal Intent

McKnight next asserts she was entitled to a directed verdict as the state failed to prove she had the requisite criminal intent to commit homicide by child abuse. We disagree.

Under S.C. Code § 16-3-85(A), a person is guilty of homicide by child abuse if the person causes the death of a child under the age of eleven while committing child abuse

or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life. McKnight claims there is no evidence she acted with extreme indifference to human life as there was no evidence of how likely cocaine is to cause stillbirth, or that she knew the risk that her use of cocaine could result in the stillbirth of her child.

Recently, in *State v. Jarrell,* 350 S.C. 90, 97, 564 S.E.2d 362, 366 (Ct.App.2002), the Court of Appeals defined extreme indifference, as used in the homicide by child abuse statute, stating:

> In this state, indifference in the context of criminal statutes has been compared to the conscious act of disregarding a risk which a person's conduct has created, or a failure to exercise ordinary or due care. See *State v. Rowell,* 326 S.C. 313, 315, 487 S.E.2d 185, 186 (1997) (discussing the requisite mental state for recklessness); *see generally Hooper v. Rockwell,* 334 S.C. 281, 297, 513 S.E.2d 358, 367 (1999) ("Conduct of the parent which evinces a settled purpose to forego parental duties may fairly be characterized as willful because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent."). At least one other jurisdiction with a similar statute has found that "[a] person acts 'under circumstances manifesting extreme indifference to the value of human life' when he engages in deliberate conduct which culminates in the death of some person." *Davis v. State,* 325 Ark. 96, 925 S.W.2d 768, 773 (1996). Therefore, we ... hold that in the context of homicide by abuse statutes, extreme indifference is a mental state akin to intent characterized by a deliberate act culminating in death.

Similarly, in reckless homicide cases, we have held that reckless disregard for the safety of others signifies an indifference to the consequences of one's acts. It denotes a

conscious failure to exercise due care or ordinary care or a conscious indifference to the rights and safety of others or a reckless disregard thereof. *See State v. Tucker,* 273 S.C. 736, 259 S.E.2d 414 (1979).

In *Whitner v. State,* 328 S.C. 1, 10, 492 S.E.2d 777, 782 (1997), *cert. denied* 523 U.S. 1145, 118 S.Ct. 1857, 140 L.Ed.2d 1104 (1998), this Court noted that although the precise effects of maternal crack use during pregnancy are somewhat unclear, it is well documented and within the realm of public knowledge that such use can cause serious harm to the viable unborn child. Given this common knowledge, Whitner was on notice that her conduct in utilizing cocaine during pregnancy constituted child endangerment. *Id.* at 16, 492 S.E.2d at 785. Indeed, more than twelve years ago, Justice Toal wrote:

> The drug "cocaine" has torn at the very fabric of our nation. Families have been ripped apart, minds have been ruined, and lives have been lost. It is common knowledge that the drug is highly addictive and potentially fatal. The addictive nature of the drug, combined with its expense, has caused our prisons to swell with those who have been motivated to support their drug habit through criminal acts. In some areas of the world, entire governments have been undermined by the cocaine industry.

State v. Major, 301 S.C. 181, 391 S.E.2d 235 (1990).

Here, it is undisputed that McKnight took cocaine on numerous occasions while she was pregnant, that the urine sample taken immediately after she gave birth had very high concentrations of cocaine, and that the baby had benzoylecgonine in its system. The DSS investigator who interviewed McKnight shortly after the birth testified that McKnight admitted she knew she was pregnant and that she had been using cocaine when she could get it, primarily on weekends. Given the fact that it is public knowledge that

usage of cocaine is potentially fatal, we find the fact that McKnight took cocaine knowing she was pregnant was sufficient evidence to submit to the jury on whether she acted with extreme indifference to her child's life. Accordingly, the trial court correctly refused a directed verdict. *State v. Pinckney, supra* (if the State presents any evidence which reasonably tends to prove defendant's guilt, or from which defendant's guilt could be fairly and logically deduced, case must go to the jury).

c. Viability

Finally, McKnight asserts she was entitled to a directed verdict as there was no evidence the baby was viable at the time she ingested cocaine. This argument was not raised in McKnight's motions to dismiss. Nor was it ruled on by the trial court. Accordingly, this argument is unpreserved. *State v. Hicks,* 330 S.C. 207, 499 S.E.2d 209, *cert. denied,* 525 U.S. 1022, 119 S.Ct. 552, 142 L.Ed.2d 459 (1998) (issue must be raised to and ruled upon by trial court to be preserved for review).

2. DISMISSAL OF HOMICIDE INDICTMENT

McKnight next asserts the trial court erred in refusing to dismiss the homicide by child abuse indictment on the grounds that a) the more specific criminal abortion statute governs, b) the homicide by child abuse statute does not apply to the facts of this case, and c) the legislature did not intend the statute to apply to fetuses. We disagree.

a. Criminal Abortion Statute

Initially, McKnight asserts the criminal abortion statute, S.C. Code § 44-41-80, is a more specific statute which controls under the circumstances of this case. McKnight did not raise this contention to the trial court. Contrary to the assertions in her reply brief, although McKnight did argue that the statute was inapplicable to the circumstances of this

case, at no time did she assert that the criminal abortion statute was the more specific, controlling statute. Accordingly, this issue is unpreserved. *State v. Hicks, supra* (issue must be raised to and ruled upon by trial court to be preserved for review).

b. Application of Homicide by Abuse Statute in This Case

McKnight next asserts the Legislature did not intend the homicide by child abuse statute apply to the stillbirth of a fetus. We disagree.

McKnight asserts the term child, as used in the statute, is most naturally read as including only children already born. *See* S.C. Code § 16-3- 85(B). In several cases this Court has specifically held that the Legislature' use of the term child includes a viable fetus. *State v. Ard,* 332 S.C. 370, 505 S.E.2d 328 (1998); *Whitner v. State,* 328 S.C. 1, 492 S.E.2d 777 (1997); *State v. Horne,* 282 S.C. 444, 319 S.E.2d 703 (1984). McKnight cites to portions of the statute defining harm as relating to corporal punishment and/or abandonment; she asserts this demonstrates that the statute was clearly intended to apply only to children already born. However, section 16-3-85(B) also defines harm as inflicting or allowing to be inflicted on the child physical injury ... and failing to supply the child with adequate health care ... Either of these provisions may clearly be applied to an unborn child. Accordingly, given the language of the statute, and this Court's prior opinions defining a child to include a viable fetus, we find the plain language of the statute does not preclude its application to the present case.

c. Legislative History

McKnight lastly asserts that the legislative history of section 16- 3-85 conclusively demonstrates that it does not apply to unborn children. We find this contention unpersuasive.

Section 16-3-85 was amended by 2000 Acts No. 261, § 1. The prior statute read that a person is guilty of homicide by child abuse who causes the death of a child under the age of eleven while committing child abuse or neglect as defined in *Section 20-7-490,*[4] and the death occurs under circumstances manifesting an extreme indifference to human life. (Emphasis supplied). The effect of the 2000 amendment was the deletion of the reference to the definitions of abuse and neglect contained in section 20-7-490, and the addition of subsection (B), defining those terms as follows:

> (1) "child abuse or neglect" means an act or omission by any person which causes harm to the child's physical health or welfare;
>
> (2) "harm" to a child's health or welfare occurs when a person:
>
> (a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment;
>
> (b) fails to supply the child with adequate food, clothing, shelter, or health care, and the failure to do so causes a physical injury or condition resulting in death; or
>
> (c) abandons the child resulting in the child's death.

There is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects. *State v. Corey D.*, 339 S.C. 107, 529 S.E.2d 20 (2000); *Berkebile v. Outen,* 311 S.C. 50, 426 S.E.2d 760 (1993). The homicide by child abuse statute was amended in May 2000, some three years after this Court, in *Whitner,* had specifically held that the term

---

[4]Section 20-7-490 is contained in the Children's Code and defines child as a person under the age of eighteen and also defines abused or neglected child, and harm.

child includes a viable fetus.[5] The fact that the legislature was well aware of this Court's opinion in *Whitner*, yet failed to omit viable fetus from the statute's applicability, is persuasive evidence that the legislature did not intend to exempt fetuses from the statute's operation. Contrary to McKnight's assertion, we do not find the legislature's decision to define the terms abuse and neglect within the

---

[5]We granted McKnight's motion to argue against the precedent of *Whitner v. State, supra*. We adhere to our opinion in *Whitner*. As did Whitner, McKnight forebodes a parade of horribles and points to commentators who object to the prosecution of pregnant women as being contrary to public policy and deterring women from seeking appropriate medical care and/or creating incentives for women to seek abortions to avoid prosecution. *See e.g.* Tolliver, *Child Abuse Statute Expanded to Protect the Viable Fetus: The Abusive Effects of South Carolina's Interpretation of the Word Child*, 24 S.Ill.U.L.J. 383 (Winter 2000); DeLouth, *Pregnant Drug Addicts As Child Abusers: A South Carolina Ruling*, 14 Berkeley Women's L.J. 96 (1999).

However, not all of the commentaries concerning *Whitner* have been critical. *See* Miller, *Fetal Neglect and State Intervention: Preventing Another Attleboro Cult Baby Death*, 8 Cardozo Women's L.J. 71 (2001)(suggesting that the state's interest in protecting the life of the fetus takes precedence over any rights the mother may have and that the fetus has the right to be protected by the State as soon as the fetus is viable or when a woman can no longer obtain a legal abortion); Janssen, *Fetal Rights and the Prosecution of Women For Using Drugs During Pregnancy*, 48 Drake L.Rev. 741 (2000); Schueller, *The Use of Cocaine by Pregnant Women: Child Abuse or Choice* ? 25 J. Legisl. 163 (1999). As noted by Janssen, although the threat of abortion or lack of prenatal care is real, the burden placed on pregnant substance abusers is not the burden to get an abortion. Rather the burden is on the woman to stop using illegal drugs once she has exercised her constitutional decision not to have an abortion.... Once the mother has made the choice to have a child, she must accept the consequences of that choice. One of the consequences of having children is that it creates certain duties and obligations to that child. If a woman does not fulfill those obligations, then the state must step in to prevent harm to the child. As one judge aptly pointed out, there is simply 'no reason to treat a child in utero any differently from a child ex utero where the mother has decided not to destroy the fetus or where the time allowed for such destruction is past.' 48 Drake L.Rev. at 762-763 (Internal citation omitted).

confines of section 16-3-85, deleting the reference to section 20-7-490 of the Children's Code, in any way evinces a retraction from our opinion in *Whitner*. Although *Whitner* did examine the policy and purpose of the Children's Code, that discussion was not central to our holding. More fundamentally, *Whitner* found no basis upon which to grant a viable fetus the status of a person for purposes of homicide and wrongful death laws, while denying such status in the context of child abuse. Indeed, if the legislature had intended to remove a fetus from the operation of the statute, it could have plainly said so. *Stardancer Casino v. Stewart,* 347 S.C. 377, 556 S.E.2d 357 (2001); *Tilley v. Pacesetter,* 333 S.C. 33, 508 S.E.2d 16 (1998) (if legislature had intended certain result in statute it would have said so).

3. DUE PROCESS/NOTICE

McKnight next asserts application of the homicide by child abuse statute to her violates due process; she contends she had no notice the statute could be applied to a woman whose fetus is stillborn. We disagree.

In numerous cases dating since 1960, we have held that a viable fetus is a person. *Hall v. Murphy,* 236 S.C. 257, 113 S.E.2d 790 (1960); *Fowler v. Woodward,* 244 S.C. 608, 138 S.E.2d 42 (1964); *State v. Horne,* 282 S.C. 444, 319 S.E.2d 703 (1984). In *Whitner, supra,* we reiterated the fact that a viable fetus is a child within the meaning of the child abuse and endangerment statute. Most recently, we held that a viable fetus is both "person" and "child" as used in statutory aggravating circumstances which provide for death penalty eligibility. *State v. Ard,* 332 S.C. 370, 505 S.E.2d 328 (1998).

A penal statute offends due process only when it fails to give fair notice of the conduct it proscribes. *State v. Edwards,* 302 S.C. 492, 397 S.E.2d 88 (1990); *State v. Smith,* 275 S.C. 164, 268 S.E.2d 276 (1980). The statute must give sufficient notice to enable a reasonable person to

comprehend what is prohibited. *State v. Crenshaw,* 274 S.C. 475, 266 S.E.2d 61, *cert. denied,* 449 U.S. 883, 101 S.Ct. 236, 66 L.Ed.2d 108 (1980). In *Whitner,* we rejected the claim that application of the child endangerment and neglect statute did not give the defendant fair notice of the conduct proscribed, stating:

> The statute forbids any person having legal custody of a child from refusing or neglecting to provide proper care and attention to the child so that the life, health, or comfort of the child is endangered or is likely to be endangered. As we have found above, the plain meaning of "child" as used in this statute includes a viable fetus. Furthermore, it is common knowledge that use of cocaine during pregnancy can harm the viable unborn child. Given these facts, we do not see how Whitner can claim she lacked fair notice that her behavior constituted child endangerment as proscribed in section 20-7-50. Whitner had all the notice the Constitution requires.

328 S.C. at 16, 492 S.E.2d at 784-785.

Similarly, a person is guilty of homicide by child abuse if the person causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life. Under *Whitner,* taking cocaine while pregnant constitutes neglect and, as discussed in Issue 1 above, it was a jury question whether McKnight acted with extreme indifference to human life. Given the ample authority in this state finding a viable fetus to be a person, we find McKnight was on notice that her conduct in ingesting cocaine would be proscribed.[6]

---

[6]McKnight also asserts the statute as interpreted to apply to pregnant women is void for vagueness as it is unclear what conduct by a pregnant woman is likely to result in the stillbirth of her fetus. As recently recognized by the Court in *Curtis v. State,* 345 S.C. 557, 549 S.E.2d 591 (2001), however, one to whose conduct the law clearly applies does not

4. RIGHT TO PRIVACY

McKnight next asserts application of the homicide by child abuse statute to women for conduct during pregnancy violates the constitutional rights of privacy and autonomy.

McKnight asserts several policy reasons why women should not be placed in the position of fearing prosecution for conduct engaged in while pregnant (e.g., choosing abortion over pregnancy, foregoing medical care, etc.). While she raises a number of legitimate concerns, she is in reality attempting to assert the privacy rights of other pregnant women, something she does not have standing to do. *Curtis v. State, supra* (one cannot obtain a decision as to the invalidity of an act on the ground that it impairs the rights of others).

As to her own right to privacy, this Court specifically rejected the claim that prosecution for abuse and neglect of a viable fetus due to the mother's ingestion of cocaine violates any fundamental right. *Whitner, supra.* In *Whitner* we stated,

> It strains belief for Whitner to argue that using crack cocaine during pregnancy is encompassed within the constitutionally recognized right of privacy. Use of crack cocaine is illegal, period. No one here argues that laws criminalizing the use of crack cocaine are themselves unconstitutional. If the State wishes to impose additional criminal penalties on pregnant women who engage in this already illegal conduct because of the effect the conduct has on the viable fetus, it may do so. We do not see how the fact of pregnancy elevates the use of crack cocaine to the lofty status of a fundamental right.

328 S.C. at 18, 492 S.E.2d at 786. Accordingly, we find

---

have standing to challenge it for vagueness. Given that the statute clearly applies to a stillbirth caused by ingestion of cocaine, McKnight lacks standing to raise a void for vagueness contention.

McKnight's right of privacy was not violated.

5. EIGHTH AMENDMENT

McKnight next asserts the trial court erred in refusing to dismiss the indictment on Eighth Amendment grounds. We disagree.

The cruel and unusual punishment clause requires the duration of a sentence not be grossly out of proportion with the severity of the crime. *Solem v. Helm,* 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). Pursuant to *Solem,* this Court reviews three factors in assessing proportionality: (1) the gravity of the offense compared to the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences for the same crime in other jurisdictions. *State v. Jones,* 344 S.C. 48, 543 S.E.2d 541 (2001).[7]

Here, the gravity of the offense is severe; McKnight is charged with homicide.[8] The sentence for homicide by child abuse under S.C. Code § 16-3-85(C)(1) is twenty years to life, and McKnight received a twenty year sentence, suspended upon service of twelve years. The penalty is no harsher than that imposed upon any other individual charged with murder. *See* S.C. Code § 16-3-20 (persons guilty of murder must be punished by death, life imprisonment, or mandatory minimum term of thirty years); *Simmons v. State,* 264 S.C. 417, 215 S.E.2d 883 (1975) (holding sentence of life

---

[7]It is questionable, in light of the United States Supreme Court's opinion in *Harmelin v. Michigan,* 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), whether the stringent three-factor *Solem* inquiry remains mandated in "cruel and unusual punishment" cases. *See State v. Brannon,* 341 S.C. 271, 533 S.E.2d 345 (Ct.App.2000) (finding 3 prong inquiry no longer applicable and requiring only a threshold comparison of the gravity of the offenses against the severity of the sentence).

[8]To the extent McKnight attempts to compare the gravity of the offense with criminal abortion, she is, in reality, raising an equal protection claim. *See* Issue 6 below.

imprisonment resulting from a wrongful killing caused by the use of an automobile is not cruel and unusual punishment).

Finally, although other states have not defined a viable fetus as a child for purposes of criminal prosecution of a pregnant mother, other states impose severe sentences on those who are guilty of the murder or neglect of a child. *See e.g.*, Az. St. § 13-604.1(B)(person convicted of attempted murder of a minor under twelve years of age may be sentenced to life imprisonment); Or. St. § 163.115(1)(c)(when a person by abuse, recklessly under circumstances manifesting extreme indifference to the value of human life, causes the death of a child under 14 years of age, it is murder requiring mandatory life sentence); W.Va. Code § 61-8D-2 (parent who maliciously and intentionally fails to supply child with necessary food, clothing, shelter or medical care resulting in child's death is guilty of murder in first degree and penalized accordingly). We find no Eighth Amendment violation.

6. EQUAL PROTECTION

McKnight next asserts that application of the homicide by child abuse statute to her violates equal protection inasmuch as a person charged under the criminal abortion statute is subjected to a maximum of two years imprisonment, while one prosecuted under the homicide by child abuse statute is subjected to the possibility of life imprisonment.

This issue is procedurally barred from review. While McKnight did file a pre-trial motion to dismiss based upon equal protection, and renewed that motion at trial, her arguments at trial were premised upon the statute's applicability only to women and its disparate impact upon women. At no time did she raise the contention she now raises concerning the disproportionality of the criminal

abortion statute. Accordingly, this argument is unpreserved and we therefore decline to address it. *State v. Dickman,* 341 S.C. 293, 534 S.E.2d 268 (2000) (party may not argue one ground at trial and an alternate ground on appeal); *In re McCracken,* 346 S.C. 87, 551 S.E.2d 235 (2001) (constitutional claim must be raised and ruled upon to be preserved for appellate review).

7. SUPPRESSION OF URINE SAMPLE

Finally, McKnight asserts the trial court erred in refusing to suppress the results of a urine sample taken at the hospital after the stillbirth, contending the sample was taken in violation of her fourth amendment rights. We disagree.

Pursuant to a Conway Hospital Protocol for the Management of Drug Abuse during Pregnancy, a medical urine drug screening *may* be ordered at the discretion of the attending physician if an obstetrical patient meets one of several criteria, including lack of prenatal care or unexplained fetal demise. If such a drug screening test turns up positive from the hospital's lab, then hospital personnel are to request consent from the patient for forensic (medical-legal) testing. If consent is obtained, the sample is sent to the hospital's reference lab and the nursery is notified. The Department of Social Services is to be notified of positive medical urine drug screening and the criteria causing the drug screen to be done, and whether forensic testing is being done on the mother or newborn. The protocol states that As mandated by law, it is the obligation of every medical facility, as well as each individual, to report to DSS any suspected abuse or neglect involving an unborn, yet viable, fetus or newborn child. The hospital also has a Chain of Custody form and procedure for handling forensic samples.

Here, an initial drug screen was ordered by the

obstetrician, Dr. Niles, due to McKnight's lack of prenatal care. When the initial screen tested positive for cocaine, Mary McBride, a labor and delivery nurse, was instructed to obtain a forensic urine sample from McKnight. Before doing so, McBride read an Informed Consent to Drug Testing form to McKnight. McBride testified she read the form to McKnight, and advised her that it could be used for legal purposes; she did not, however, specifically advise McKnight that police would possibly arrest her. The form states that McKnight acknowledges she has testified positive for cocaine, and is being requested to give consent for a medical-legal (forensic) test which will confirm or deny the initial report. The form further states that It has been explained to me that I may refuse consent for this test. It has been explained to me that this test may be used for legal purposes. McKnight signed the form indicating her consent. The second sample also tested positive for cocaine.

McKnight asserts the forensic/legal sample was taken in violation of her fourth amendment rights, contrary to the United States Supreme Court's opinion in *Ferguson v. City of Charleston,* 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001). We disagree. The issue in *Ferguson,* as framed by the Court, was as follows:

> In this case, we must decide whether a state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure. More narrowly, the question is whether the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine can justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant.

532 U.S. at 69-70, 121 S.Ct. 1281.

In *Ferguson,* staff members of MUSC developed a

written policy, in conjunction with the solicitor and police, for obtaining evidence to prosecute women who bore children who tested positive for drugs at birth. These procedures provided a plan to identify and test pregnant patients suspected of drug use *without their knowledge or consent*. The plan (1) required that a chain of custody be followed when obtaining and testing patients' urine samples, (2) contained police procedures and criteria for arresting patients who tested positive, and (3) encouraged prosecution for drug offenses and child neglect, and specifically set forth the offenses with which the women could be charged, as well as procedures for police to follow upon arresting the women. *Id.* at 70-73, 121 S.Ct. 1281.

The Supreme Court held MUSC's performance of diagnostic tests to obtain evidence of the women's criminal conduct for law enforcement purposes was an unreasonable search if the patient had not consented to the procedure. *Id.* at 84-85, 121 S.Ct. 1281. The Court held that [g]iven the primary purpose of the Charleston program, which was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every stage, the policy did not fit with the closely guarded special needs category which would justify a warrantless, non-consensual search. *Id.*

Ferguson is distinguishable in several respects. First, there is no evidence that Conway Hospital's policy was in any way developed or implemented in conjunction with police, the solicitor, the Attorney General, or any other law enforcement personnel. Second, unlike the policy at issue in *Ferguson,* Conway Hospital's policy did not require hospital staff to turn drug screening results over to law enforcement personnel. On the contrary, the hospital's protocol merely requires that its department of social work services be notified and that a telephone referral be made to DSS when an assessment reveals suspicion of illegal drug use or reason to believe the unborn or newborn child is at risk. A DSS

caseworker is not a law enforcement officer. *State v. Sprouse,* 325 S.C. 275, 478 S.E.2d 871 (Ct.App.1996).

Third, unlike *Ferguson,* Conway Hospital's testing was not done surreptitiously, but was done with McKnight's knowledge and consent. The labor and delivery nurse specifically testified that she obtained a written consent form from McKnight to perform the second urine specimen; the consent form indicated to McKnight that she had the right to refuse the test, and that it could be used for legal purposes.

We find the state sufficiently demonstrated, through the testimony of Nurse McBride, that McKnight consented to the search. The only evidence in the record on this point is the testimony of McBride, who testified that she read the form to McKnight, and told her that the sample could be used for legal purposes. The form which was read to McKnight specifically advised that she may refuse consent, and that the test may be used for legal purposes. This is sufficient evidence upon which to find the consent was voluntary. *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *State v. Wallace,* 269 S.C. 547, 238 S.E.2d 675 (1977) (whether a consent to search was voluntary is a question of fact to be determined from the "totality of the circumstances").

Finally, even assuming *arguendo* that McKnight did not consent to the urine specimen, and that it was illegally obtained, we find any error in its admission was harmless. The DSS caseworker testified, without objection, that McKnight told her she knew she was pregnant and that she had been using crack cocaine when she could get it. Further, the defenses' own expert, Dr. Conradi, testified that cocaine was in the baby at some point. Both of the state's expert pathologists testified that the only way for the infant to have the benzoylecgonine present was through cocaine, and that the cocaine had to have come from the mother. Given this

evidence, even assuming the urine sample was erroneously admitted, it could not have impacted the jury's verdict. *Arnold v. State,* 309 S.C. 157, 420 S.E.2d 834 (1992), *cert. denied,* 507 U.S. 927, 113 S.Ct. 1302, 122 L.Ed.2d 691 (1993) (error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained).

McKnight's conviction and sentence are affirmed.

AFFIRMED.

TOAL, C.J., and BURNETT, J., concur.

JUSTICE MOORE:

I respectfully dissent. Once again, I must part company with the majority for condoning the prosecution of a pregnant woman under a statute that could not have been intended for such a purpose. Our abortion statute, S.C. Code § 44-41-80(b) (2002), carries a maximum punishment of two years or a $1,000 fine for the intentional killing of a viable fetus by its mother. In penalizing this conduct, the legislature recognized the unique situation of a feticide by the mother. I do not believe the legislature intended to allow the prosecution of a pregnant woman for homicide by child abuse under S.C.Code § 16-3-85(A)(1) (Supp.2001) which provides a disproportionately greater punishment of twenty years to life.

As expressed in my dissent in *Whitner v. State,* 328 S.C. 1, 492 S.E.2d 777 (1997),[9] it is for the legislature to determine whether to penalize a pregnant woman's abuse of her own body because of the potential harm to her fetus. It is not the business of this Court to expand the application of a criminal statute to conduct not clearly within its ambit. To the contrary, we are constrained to strictly construe penal statutes in the defendant's favor. *State v. Blackmon,* 304

[9]*See also State v. Ard,* 332 S.C. 370, 505 S.E.2d 328 (1998) (Moore, J. dissenting).

S.C. 270, 403 S.E.2d 660 (1991).

Because I disagree that § 16-3-85 applies in this case, I dissent.

PLEICONES, J., concurs.

Constitutional And Statutory Provisions

U.S. Const. amend. XIV

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. VIII.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments

S.C. Code § 16-3-85 Homicide by child abuse; definitions; penalty; sentencing

[as amended, 2000 Act No. 261, § 1]

(A) A person is guilty of homicide by child abuse if the person:

(1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life; or

(2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven.

(B) For purposes of this section, the following definitions apply:

(1) "child abuse or neglect" means an act or omission by any person which causes harm to the child's physical health or welfare;

(2) "harm" to a child's health or welfare occurs when a person:

(a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment;

(b) fails to supply the child with adequate food, clothing, shelter, or health care, and the failure to do so causes a physical injury or condition resulting in death; or

(c) abandons the child resulting in the child's death.

(C) Homicide by child abuse is a felony and a person who is convicted of or pleads guilty to homicide by child abuse:

(1) under subsection (A)(1) may be imprisoned for life but not less than a term of twenty years; or

(2) under subsection (A)(2) must be imprisoned for a term not exceeding twenty years nor less than ten years.

(D) In sentencing a person under this section, the judge must consider any aggravating circumstances including, but not limited to, a defendant's past pattern of child abuse or neglect of a child under the age of eleven, and any mitigating circumstances; however, a child's crying does not constitute provocation so as to be considered a mitigating circumstance.

S.C. Code § 16-3-85 Homicide by child abuse; definitions; penalty; sentencing.

[As enacted, 1992 Act No. 412, § 1]

(A) A person is guilty of homicide by child abuse who:

(1) causes the death of a child under the age of eleven while committing child abuse or neglect as defined in Section 20-7-490 and the death occurs under circumstances manifesting an extreme indifference to human life; or

(2) knowingly aids and abets another person to commit child abuse or neglect as defined in Section 20-7-490 and the child abuse or neglect results in the death of a child under the age of eleven.

(B) Homicide by child abuse is a felony and a person who is convicted of or pleads guilty to homicide by child abuse:

(1) under subsection (A)(1) may be imprisoned for life but not less than a term of twenty years; or

(2) under subsection (A)(2) must be imprisoned for a term not exceeding twenty years nor less than ten years.

(C) In sentencing a person under this section the judge shall consider any aggravating circumstances, including, but not limited to, a defendant's past pattern of child abuse or neglect of a child under the age of eleven, and any mitigating circumstances; however, a child's crying does not constitute provocation so as to be considered a mitigating circumstance.

§ 44-41-10. Definitions.

As used in this chapter:

(a) *"Abortion"* means the use of an instrument, medicine, drug, or other substance or device with intent to terminate the pregnancy of a woman known to be pregnant for reasons other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus.

* * * *

(f) *"Pregnancy"* means the condition of a woman carrying a fetus or embryo within her body as the result of conception.

* * * *

(i) *"First trimester of pregnancy"* means the first twelve weeks of pregnancy commencing with conception rather than computed on the basis of the menstrual cycle.

(j) *"Second trimester of pregnancy"* means that portion of a pregnancy following the twelfth week and extending through the twenty-fourth week of gestation.

(k) *"Third trimester of pregnancy"* means that portion of a pregnancy beginning with the twenty-fifth week of gestation.

(l) *"Viability"* means that stage of human development

when the fetus is potentially able to live outside of the mother's womb with or without the aid of artificial life support systems. For the purposes of this chapter, a legal presumption is hereby created that viability occurs no sooner than the twenty- fourth week of pregnancy.

§ 44-41-20. Legal Abortions.

Abortion shall be a criminal act except when performed under the following circumstances:

(a) During the first trimester of pregnancy the abortion is performed with the pregnant woman's consent by her attending physician pursuant to his professional medical judgment.

(b) During the second trimester of pregnancy the abortion is performed with the pregnant woman's consent by her attending physician in a hospital or clinic certified by the Department.

(c) During the third trimester of pregnancy, the abortion is performed with the pregnant woman's consent, and if married and living with her husband the consent of her husband, in a certified hospital, and only if the attending physician and one additional consulting physician, who shall not be related to or engaged in private practice with the attending physician, certify in writing to the hospital in which the abortion is to be performed that the abortion is necessary based upon their best medical judgment to preserve the life or health of the woman.

§ 44-41-80. Performing or soliciting unlawful abortion; testimony of woman may be compelled.

(a) Any person, except as permitted by this chapter, who

provides, supplies, prescribes or administers any drug, medicine, prescription or substance to any woman or uses or employs any device, instrument or other means upon any woman, with the intent to produce an abortion shall be deemed guilty of a felony and, upon conviction, shall be punished by imprisonment for a term of not less than two nor more than five years or fined not more than five thousand dollars, or both. *Provided,* that the provisions of this item shall not apply to any woman upon whom an abortion has been attempted or performed.

(b) Except as otherwise permitted by this chapter, any woman who solicits of any person or otherwise procures any drug, medicine, prescription or substance and administers it to herself or who submits to any operation or procedure or who uses or employs any device or instrument or other means with intent to produce an abortion, unless it is necessary to preserve her life, shall be deemed guilty of a misdemeanor and, upon conviction, shall be punished by imprisonment for a term of not more than two years or fined not more than one thousand dollars, or both.

(c) Any woman upon whom an abortion has been performed or attempted in violation of the provisions of this chapter may be compelled to testify in any criminal prosecution initiated pursuant to subsection (a) of this section; *provided, however,* that such testimony shall not be admissible in any civil or criminal action against such woman and she shall be forever immune from any prosecution for having solicited or otherwise procured the performance of the abortion or the attempted performance of the abortion upon her.

Supreme Court, U.S.
FILED
JUL 2 9 2003
OFFICE OF THE CLERK

No. 02-1741

In the
Supreme Court of the United States

REGINA D. MCKNIGHT, *PETITIONER*,

v.

STATE OF SOUTH CAROLINA, *RESPONDENT*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HENRY DARGAN McMASTER
Attorney General for the
State of South Carolina

JOHN W. McINTOSH
Chief Deputy Attorney General

CHARLES H. RICHARDSON
Assistant Deputy Attorney General

NORMAN MARK RAPOPORT
Senior Assistant Attorney General

DEBORAH R.J. SHUPE
Counsel of Record
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727
COUNSEL FOR RESPONDENT

RESPONDENT'S QUESTIONS PRESENTED

Whether application of South Carolina's homicide by child abuse statute to the Petitioner based on the *in utero* death of her viable child from Petitioner's use of crack cocaine violates due process?

Whether South Carolina's homicide by child abuse is void for vagueness as applied to the Petitioner?

Whether application of South Carolina's homicide by child abuse statute to the Petitioner based on the *in utero* death of her viable child from Petitioner's use of crack cocaine violates Petitioner's right to privacy?

Whether the standard of review applied by the South Carolina Supreme Court is consistent with constitutional principles?

Whether application of South Carolina's homicide by child abuse statute to the Petitioner based on the *in utero* death of her viable child from Petitioner's use of crack cocaine constitutes cruel and unusual punishment?

TABLE OF CONTENTS

RESPONDENT'S QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 8

I. Application of South Carolina Homicide by Child Abuse Statute in the Instant case Did not Conflict with this Court's Due Process Decisions. 10

A. Application of the Statute Was Clearly Foreseeable under Existing South Carolina Jurisprudence. 10

B. Petitioner Does Not Have Standing to Challenge the Statute as Void for Vagueness. 18

C. Application of the Statute in this Case Does Not Violate Substantive Due Process. 21

D. The South Carolina Supreme Court Applied an Appropriate Standard of Review. 25

II. Application of South Carolina's Homicide by Child Abuse Statute in this Case Does Not Constitute Cruel and Unusual Punishment 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Bailey v. Anderson, 326 U.S. 203 (1945) 15

Bell v. Maryland, 378 U.S. 226 (1964) 14

Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) ... 23

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 18, 19

City of Chicago v. Morales, 521 U.S. 41 (1999) 21

Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001),
cert. denied 535 U.S. 926 (2002) 19

Durley v. Mayo, 351 U.S. 277 (1956) 15, 17, 20, 25

Ewing v. California, 123 S.Ct. 1179 (2003) 23, 27, 29

Exxon Corp. v. Eagerton, 462 U.S. 176 (1983)
(citing *Fuller v. Oregon*, 417 U.S. 40 (1974) 25

Ferguson v. City of Charleston, 121 S.Ct. 1281 (2001) . 12, 13

Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964) . 11

Hall v. Murphy, 236 S.C. 257, 113 S.E.2d 790 (1960) .. 10, 11

Harmelin v. Michigan, 501 U.S. 957
(1991) 16, 17, 19, 27, 28, 29

In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001) 28

Jackson v. Virginia, 443 U.S. 307 (1979) 26, 27

Merrill Lynch v. Curran, 456 U.S. 353 (1982) 12

Parker v. Levy, 417 U.S. 733 (1974) 19

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) 22

Roe v. Wade, 410 U.S. 113 (1973) 13, 22

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) 17

State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998) . . . 6, 13, 16

State v. Brannon, 341 S.C. 271, 533 S.E.2d 345 (Ct. App. 2000) 27

State v. Corey D., 339 S.C. 107, 529 S.E.2d 20 (2000) 12

State v. Horne, 282 S.C. 444, 319 S.E.2d 703 (1984) 11, 12, 16, 19

State v. Hudson, 277 S.C. 200, 285 S.E.2d 773 (1981) 27

State v. Lollis, 343 S.C. 580, 541 S.E.2d 254 (2001) 26

State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001) 26

State v. McKnight, Pet. App., pp. 1a - 22a . . . . . *passim*

State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000) 26

State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000) 26

State v. Robinson, 310 S.C. 535, 426 S.E.2d 317 (1992) . . . 26

State v. Sherman, 234 Md. 179, 198 A.2d 71 (1964) 11

Stembridge v. Georgia, 343 U.S. 541 (1952) 15

Ulster County Court v. Allen, 442 U.S. 140 (1979) 29

Webster v. Reproductive Health Services, 492 U.S. 490 (1989) 22

Whitner v. State, 328 S.C. 1, 492, S.E.2d 777 (1997), *cert. denied*, 523 U.S. 1145 (1998) . . . . . *passim*

STATUTES

S.C. Code §16-3-10 (1976) 11

S.C. Code §16-3-85 (Supp. 2002) . . . . . *passim*

S.C. Code §16-3-85 (Supp. 1999) 1, 11

S.C. Code §20-7-50 (Supp. 2002) 12

S.C. Code §20-7-490 (Supp. 2002) 1, 12

S.C. Code §44-41-80 (2002) 15

Title 16, Chapter 3, South Carolina Code of Laws 1, 8

OTHER AUTHORITIES

Coady, *Extending Child Abuse Protection to the Viable Fetus: Whitner v. State of South Carolina*, 71 St. John's L. Rev. 667 (1997) 23

Janssen, Fetal Rights and the Prosecution of Women for Using Drugs During Pregnancy, 48 Drake L. Rev. 741, 763 (2000) 19, 23

Schueller, *The Use of Cocaine by Pregnant Women: Child Abuse of Choice*, 25 J. Legis. 163 (1999) . 19, 23

STATEMENT OF THE CASE

In 1960, the South Carolina Supreme Court held that a viable fetus is a "person" under South Carolina law, and if injured *in utero*, could sustain a civil action after birth for those injuries. In 1984, the Court held that a viable fetus is a "person" under South Carolina's statutory criminal law regarding offenses against persons (Title 16, Chapter 3 of the South Carolina Code of Laws).

In 1992, the South Carolina Legislature enacted S.C. Code §16-3-85, making it a felony to kill a child under the age of eleven while committing child abuse or neglect under circumstances manifesting extreme indifference to human life ("homicide by child abuse"). As originally enacted, the statute referenced provisions of the statutory Children's Code, specifically S.C. Code §20-7-490, which defines "child abuse or neglect" and "harm."

In 1997, consistent with South Carolina's well established jurisprudence, the South Carolina Supreme Court held that for purposes of the criminal abuse provisions of the Children's Code, a viable fetus is a "child," and a mother can be held criminally responsible for injuries inflicted on the "child" *in utero* through the ingestion of crack cocaine. In 1998, the Court again addressed the status of a viable fetus in criminal cases, and held that a viable fetus is a "person" and a "child" for purposes of the statutory crime of murder, and the aggravating circumstances delineated as grounds for imposing the death penalty.

In May 1999, the Petitioner Regina D. McKnight ("McKnight") was transported by ambulance to the Conway Hospital in Conway, South Carolina. It was readily apparent that McKnight was pregnant with a close to term fetus, and within

several hours, she gave birth to a stillborn daughter.[1] (R., pp. 130-132, 140-151).[2]

McKnight's urine sample tested positive for cocaine. Analysis of a second urine sample taken after the baby's birth revealed the presence of the cocaine metabolite benzoylecgonine. (R., pp. 155, 223)

An autopsy of the child revealed that she was at least thirty-four weeks gestational age at the time of her death, and would have been capable of surviving separate and apart from her mother. It also revealed the presence of benzoylecgnine in her blood. (R., pp. 107-114).

Due to the presence of cocaine in McKnight's system when she gave birth, and the *in utero* death of her child, hospital personnel contacted the S.C. Department of Social Services ("DSS") as required by South Carolina's child abuse reporting laws. When a DSS child protective services investigator met with McKnight several days later, McKnight admitted she had known she was pregnant, and she had used crack cocaine on a regular basis while pregnant. (R., pp. 317-320).

McKnight was subsequently charged with homicide by child abuse in connection with the *in utero* death of her child. Prior to trial, she moved to dismiss the charge, asserting 1) the homicide by child abuse statute did not encompass stillbirths; 2) there was no evidence of malice; 3) prosecuting her under the statute was cruel and unusual punishment under the Eight Amendment because she was being prosecuted for her status as

---

[1]McKnight already had three children, who were living with relatives.

[2]References are to the Record on Appeal before the South Carolina Supreme Court.

a drug addict and a pregnant woman, and the punishment was disproportionate to the crime; 4) prosecuting her under the statute violated due process because she did not have notice she could be prosecuted; 5) prosecuting her under the statute violated her privacy rights under the Fourteenth Amendment; 6) prosecuting her under the statute violated her right to equal protection under the Fourteenth Amendment; and 7) there was no evidence indicating that her prenatal use of cocaine caused the baby's *in utero* death. (R., pp. 4-36, 41-44, 60-69). The trial court denied the motion on all grounds, and the matter was called for a jury trial in May 2001. (R., pp. 69-70).

The pathologist ("Dr. Proctor") testified at trial that McKnight's child was viable at the time of her death, which occurred *in utero* approximately one to three days prior to her birth. There was inflammation in the umbilical cord (funisitis) and placenta (chorioamnionitis), however, there was no active inflammatory process in the child herself that would account for her death, and most children with those type of inflammations are born alive. (R., pp. 111, 113-117, 125-126)

Dr. Proctor stated that the presence of benzoylecgonine in the child's blood indicated the child had cocaine in its system prior to death, and that the cocaine could only have come from McKnight's use of the drug. He testified that in and of itself, cocaine can cause death. Dr. Proctor determined that the child's death was a consequence of the chorioamnionitis, the funisitis, and McKnight's cocaine use, and ruled the death a homicide. (R., pp. 110-114, 119-123).

Another expert ("Dr. Woodard") testified that he reviewed the available medical records and the autopsy results, and agreed that McKnight's child was viable at the time of her death. He stated that cocaine can cause significant heart problems, including rhythm disorders and blood pressure increase, which can cause

congestive heart failure, and that the affects of the drug on an *in utero* child are essentially the same as what can happen to the mother taking the drug. In addition, cocaine can affect the placenta by causing the maternal blood vessels to squeeze down, which interferes with the flow of oxygen and nutrients to the child. (R., pp. 266-277).

Dr. Woodard stated that the level of benzoylecgnonine in McKnight's child indicated a "significant exposure before the child's death," and there were degenerated areas of the placenta that were consistent with cocaine exposure. He also testified that certain of the autopsy findings indicated the presence of extra fluid in the child's organs, which was consistent with congestive heart failure. (R., pp. 279-284, 289-295)

Dr. Woodard testified that to a reasonable degree of medical certainty, the chorioamnionitis and funisitis did not contribute to the child's death. He further testified that to a reasonable degree of medical certainty, intauteric cocaine exposure was the cause of death, most probably through cardiac and placental functions, and he concluded that the child would have survived absent McKnight's ingestion of crack cocaine. (R., pp. 285-287).

At the close of the State's case, McKnight moved for a directed verdict on the ground that the State had failed to present sufficient evidence to warrant submitting the case to the jury. The trial court denied the motion, finding there was "substantial" evidence for the case to proceed. (R., pp. 322-23).

McKnight presented an expert ("Dr. Conradi"), who testified the funisitis was actually healing when the child died, and therefore, it had nothing to do with the death. She also testified that while chorioamnionitis can lead to fetal death, the death will result from the fetus developing an infection from the

infected placenta. Dr. Conradi stated there was no evidence that McKnight's child had any such infection, and therefore, it was unlikely the chorioamnionitis contributed to the child's death. (R., pp. 333-340, 344, 354-355).

Dr. Conradi agreed that the child was viable at the time of her death, and that the presence of benzoylecgonine in the child's blood indicated cocaine was in the child's system at some point prior to her death. She also agreed that even one dose of cocaine can be fatal. but stated she could not conclude to any degree of medical certainty what caused the child's death in this case. (R., pp. 341-345, 349, 355-357)

The trial court instructed the jury that the State was required to prove beyond a reasonable doubt that McKnight caused the death of a child under the age of eleven while committing child abuse or neglect, and that the death occurred in circumstances showing extreme indifference to human life. It also instructed the jury that the State was required to prove criminal intent beyond a reasonable doubt, and that criminal intent could arise from actions or failure to act, negligence, recklessness, or indifference to duty or the consequences thereof. McKnight did not object to the jury instructions as given, or request any additional instructions regarding the elements of the offense, burden of proof, or intent. (R., pp. 369-380).

During deliberations, the jury requested a definition of criminal intent. With McKnight's agreement, the trial court repeated the previous instruction regarding criminal intent. McKnight did not object to the instruction as given, or request additional instructions. (R., pp. 381-383).

McKnight was convicted of homicide by child abuse, and sentenced to twenty years incarceration, suspended upon service of twelve years. (R., pp. 384, 391). She appealed her conviction

and sentence, contending 1) the trial court erred in denying her motion for a directed verdict based on insufficient evidence regarding the cause of death, criminal intent, and viability; 2) the trial court erred in denying her motion to dismiss on the ground that the homicide by child abuse statute did not apply; 3) application of the statute in her case violated her due process right to adequate notice of what constitutes criminal behavior; 4) application of the statute to women who give birth to stillborn fetuses violates women's constitutional rights to privacy, bodily integrity and liberty; 5) application of the statute in her case constituted cruel and unusual punishment; 6) application of the statute in her case violated her Fourteenth Amendment right to equal protection; and 7) the trial court erred in denying her motion to exclude certain evidence.

By opinion filed January 27, 2003, the South Carolina Supreme Court affirmed McKnight's conviction and sentence.[3] The Court held that viewing the evidence in the light most favorable to the State, there was sufficient evidence as to cause of death and criminal intent, which reasonably tended to prove McKnight's guilt, or from which her guilt could be fairly and logically deduced, and therefore, the trial court properly submitted the case to the jury. (Pet. App., pp. 3a-8a).[4]

---

[3]Justice Moore, joined by Justice Pleicones, dissented on essentially the same statutory interpretation grounds set forth in Justice Moore's dissent in *Whitner v. State*, 328 S.C. 1, 492, S.E.2d 777, 787 (1997), *cert. denied*, 523 U.S. 1145 (1998), and his concurrence in *State v. Ard*, 332 S.C. 370, 505 S.E.2d 328 (1998). (Pet. App., pp. 21a-22a).

[4]The Court held that the viability issue was not preserved for appellate review. (Pet. App., p. 8a). In any event, all the experts, including Dr. Conradi, agreed that the child was viable at the time of her death. (R., pp. 111, 272-73, 357).

The Court also held that given the law in South Carolina holding that the term "child" includes a viable fetus, the plain language of the homicide by child abuse statute encompasses a viable fetus. In addition, the Court held that in light of the South Carolina cases holding that a viable fetus is a "person" for legal purposes, and particularly that ingesting crack cocaine while pregnant with a viable fetus constitutes criminal child abuse, McKnight had ample notice that ingesting crack cocaine while pregnant with a viable fetus, with the drug's well known adverse effects on fetuses, would subject her to criminal sanctions. (Pet. App., pp. 8a-13a).

The Court held that any issue as to McKnight's individual right to privacy was decided by *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997), *cert. denied* 523 U.S. 1145 (1998). As to McKnight's policy arguments against prosecuting pregnant women who engage in conduct that harm their viable fetuses, the Court held she did not have standing to assert the privacy rights of other pregnant women since the statute was clearly applicable to her case. (Pet. App., pp. 14a-15a).

The Court also held that application of the homicide by child abuse statute in McKnight's case did not violate the Eighth Amendment prohibition of cruel and unusual punishment. The Court found that the gravity of the offense (homicide) was severe, the penalty imposed (twenty years incarceration suspended on service of twelve years) was no more severe than sentences imposed on any other individuals charged with murder (death, life imprisonment, or mandatory minimum of thirty years imprisonment), and other states impose severe sentences on those found guilty of the murder or neglect of a child.[5] (Pet. App., pp. 15a-16a).

---

[5]The Court noted that other states have not yet defined a viable fetus as a child for purposes of criminal prosecution of the mother.

The Court found that McKnight's equal protection argument based on application of the homicide by child abuse statute to her as opposed to persons charged under South Carolina's criminal abortion statute was not preserved for appellate review in that it was not raised to and ruled on by the trial court. Rather, the equal protection grounds McKnight asserted at trial were premised on the statute's applicability to women, and its disparate impact on women.[6] (Pet. App., pp. 16a-17a).

On May 27, 2003, McKnight submitted a Petition for Writ of Certiorari in this Court, which was docketed on May 30, 2003.

REASONS FOR DENYING THE PETITION

When it enacted the homicide by child abuse statute, the South Carolina Legislature was well aware of South Carolina jurisprudence holding that a viable fetus is a "person" for legal purposes, including the homicide laws. The Legislature re-visited the statute in 2000, three years after the South Carolina Supreme Court held that a viable fetus is a "child" for purposes of the criminal child abuse statute, and two years after the Court held that a viable fetus is a "person" and a "child" under South Carolina's criminal law, specifically Title 16, Chapter 3 of the South Carolina Code of Laws. In the face of that case law, which had been widely publicized locally and nationally, the Legislature made no effort to exclude viable fetuses from application of the homicide by child abuse statute, which is located in Title 16, Chapter 3. Consequently, rather than constituting an aberrant "expansion" of the statute, application of this statute to McKnight

---

[6]The Court also held that the trial court properly admitted the results of the urine sample taken after the stillbirth. (Pet. App., pp. 17a-21a). That issue is not raised in the Petition for a Writ of Certiorari, and therefore, is not before this Court.

was logical, foreseeable, and well within the statute's legislative intent.

This is not simply a case involving a tragic stillbirth that occurred through no fault of the mother. On the contrary, the evidence established a direct link between McKnight's ingestion of crack cocaine, which she had no legally protected right to do, and her child's *in utero* death.[7] Nor was McKnight prosecuted simply because she is a drug addict. Rather, she was prosecuted and convicted because she continued to ingest crack cocaine after she knew she was pregnant, and as a result, her child died when it could have survived separate and apart from McKnight.

Without doubt, when McKnight became pregnant, it was well established that under South Carolina law, a mother can be criminally prosecuted for "child abuse" if she ingests cocaine that harms her viable fetus, and a viable fetus is a "person" and a "child" for purposes of the "homicide" laws. Therefore, if McKnight's ingestion of cocaine resulted in the death of her viable fetus, she had ample notice that she could be criminally prosecuted for homicide by "child abuse" under existing South Carolina law.

Contrary to McKnight's contentions, the South Carolina Supreme Court's construction of the homicide by child abuse statute does not permit "pervasive State regulation of pregnant women," or impermissibly infringe on a woman's constitution rights. Rather, it simply recognizes the well established principle that once a woman makes the choice to carry her pregnancy to term, and the fetus becomes viable, the State has a compelling

---

[7]As the South Carolina Supreme Court noted, any dispute with the State's expert testimony on this issue went to the weight of the evidence, which McKnight was free to, and did, challenge with her own evidence. (Pet. App., p. 5a).

interest in protecting the child's life, and South Carolina law protects the child from abuse and death as a result of the woman's decision to ingest cocaine. While the fact that other states have failed to take such steps to protect viable fetuses may make South Carolina's decision to do so novel, it does not make it unconstitutional, or mandate that this Court intervene.

I. Application of South Carolina's Homicide by Child Abuse Statute in the Instant Case Did Not Conflict with this Court's Due Process Decisions.

A. Application of the Statute Was Clearly Foreseeable under Existing South Carolina Jurisprudence.

McKnight asserts that application of the homicide by child abuse statute in her case was "'unexpected and indefensible," and violated due process because no state had previously convicted a woman of homicide by child abuse when she contributed to the baby's stillbirth. Her contention is based on the mistaken premise that the South Carolina Supreme Court's decision constituted an "expansion" of the homicide by child abuse statute, and the mere fact that other states have thus far declined to undertake similar prosecutions.

When considered in the context of South Carolina jurisprudence, however, application of the statute in this case was neither "unexpected" nor "indefensible." On the contrary, it was logical, foreseeable, and amply supported by well established law.

In 1960, the South Carolina Supreme Court held that a viable fetus is a "person" under South Carolina law, and if injured *in utero*, the child can sustain a civil action after birth for those injuries. *Hall v. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960). The Court recognized the lack of South Carolina precedent for its

holding, but found that not allowing a child to maintain an action after its birth was illogical and unjust. Id. at 793.

In 1964, the Court reiterated its holding that a viable fetus is a "person," and found that since the viable child is a "person" before separation from its mother's body, a cause of action for tortious *in utero* injuries to the child arises immediately upon infliction of the injuries, and recovery for the injuries may be had even if the child is stillborn. *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964). "'The cause of action arose at the time of the injury and we see no more reason why it should be cut off because of the child's death before birth, than if it died thereafter.'" Id. at 45 (quoting *State v. Sherman*, 234 Md. 179, 198 A.2d 71 (1964)).

Finding it would be "grossly inconsistent" to construe a viable fetus as a "person" for civil liability while refusing a similar classification in the criminal context, the South Carolina Supreme Court held in 1984 that a viable fetus is a "person" within South Carolina's statutory definition of murder. *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984).[8] Acknowledging there was no prior South Carolina case holding that killing of a viable human being *in utero* could constitute criminal homicide, the court reversed the defendant's voluntary manslaughter conviction, but stated that the law of feticide would apply to all future cases. Id. at 704.

In the face of South Carolina case law including a viable fetus within the statutory definition of "person" in homicide statutes, in 1992, the South Carolina Legislature enacted S.C. Code §16-3-85, making it a felony to kill a child under the age of

---

[8]The Court was construing S.C. Code §16-3-10 (1976), which defines "murder" as the killing of any "person" with malice aforethought. 319 S.E.2d at 704.

eleven while committing child abuse or neglect under circumstances manifesting extreme indifference to human life (homicide by child abuse). *See Merrill Lynch v. Curran*, 456 U.S. 353, 379 (1982) (in construing a statute, court assumes that elected representatives know the law, and are familiar with judicial decisions construing comparable language) (internal citations omitted); *State v. Corey D.*, 339 S.C. 107, 529 S.E.2d 20 (2000) (when legislature enacts statutes, there is a presumption it has knowledge of previous legislation on related subjects, and judicial decisions construing that legislation). As originally enacted, the statute referenced provisions of the Children's Code, specifically S.C. Code §20-7-490, for the definition of "child abuse or neglect," but not for the definition of "child."[9]

In 1997, consistent with South Carolina's well established jurisprudence, the South Carolina Supreme Court held that for purposes of the Children's Code criminal abuse provisions, a viable fetus is a "child," and a mother can be held criminally responsible for injuries inflicted on the "child" *in utero* through the ingestion of crack cocaine. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997), *cert. denied* 523 U.S. 1145 (1998). Citing South Carolina's "long" history of recognizing that "viable fetuses are persons holding certain legal rights and privileges," the Court stated: "we do not see any rational basis for finding a viable fetus is a not a 'person' in the [context of the child abuse statutes]. Indeed, it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse." Id. at 780 (emphasis added); *see also Ferguson v. City of*

---

[9] The Children's Code defines a "child" as "a person under the age of eighteen," and makes it a felony to harm a child through abuse and/or neglect. S.C. Code §§20-7-50 & -490 (Supp. 2002) (emphasis added). Thus, the Children's Code reference to "child" encompasses the definition of a "person," which under *Horne*, includes a viable fetus.

Charleston, 121 S.Ct. 1281, 1284 n. 2 (2001) ("Under South Carolina law, a viable fetus has historically been regarded as a person; in 1995 the South Carolina Supreme Court held that the ingestion of cocaine during the third trimester constitutes child neglect.").[10] Noting that under *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny, states have a compelling interest in the life of a viable fetus, the Court expressly declined to insulate the mother from all culpability for harm to her viable child. *Whitner*, 492 S.E.2d at 783.

In 1998, the South Carolina Supreme Court again addressed the status of a viable fetus in criminal cases, and held that a viable fetus is a "person" and a "child" for purposes of the statutory crime of murder, and the aggravating circumstances delineated as grounds for imposing the death penalty. *State v. Ard*, 332 S.C. 370, 505 S.E.2d 328 (1998). Noting that when it enacted the statutory provisions at issue, the Legislature was aware of the case law holding that a viable fetus is a "person" under the murder statute, the Court stated: "it would be absurd to hold a viable fetus is a 'person' but not a 'child.'" Id. at 331.

In 1998, against this backdrop of South Carolina case law regarding the homicide and criminal child abuse statutes, McKnight became pregnant and made the choice to carry her child to term, but continued to ingest crack cocaine throughout her pregnancy. Her cocaine use resulted in the child's death in 1999, and she was charged with homicide by child abuse.

Before McKnight's case was tried, the South Carolina Legislature amended the homicide by child abuse statute in

---

[10]The *Whitner* and *Ferguson* cases were widely reported in the local and national media, and have been the subject of numerous law journal articles.

2000.[11] The amendment deleted the reference to the Children's Code definitions of abuse and neglect, and put the relevant definitions directly in the homicide by child abuse statute.[12] The Legislature did not, however, change the reference to "child," or make any effort to exclude viable fetuses from the definition of a "child" for purposes of the statute's application.[13]

Thus, as amended, the statute still applies to a "child under the age of eleven," which includes viable fetuses. (Pet. App., pp. 24a-25a). The Legislature's failure to exclude viable fetuses in light of the existing case law amply demonstrates the

---

[11]The parties agreed at trial that the amended statute would apply to McKnight's case. (R., pp. 442-43).

[12]McKnight's contention that deleting the Children's Code reference demonstrates the legislative intent not to include a viable fetus as a "child" under §16-3-85 is unavailing. Initially, legislative intent is an issue more appropriately determined by the state court. *See Bell v. Maryland*, 378 U.S. 226, 240 (1964). In any event, with the Children's Code reference in the statute, prosecution under §16-3-85 was limited to a parent, guardian, or other person responsible for the child's welfare. Without that reference, however, the statute encompasses anyone who kills a child by child abuse, without regard to their relationship with the child. Thus, the amendment was intended to expand the statute's scope, not limit its applicability to a viable fetus.

[13]McKnight's contentions regarding other legislative proposals considered by the S.C. Legislature are misleading and irrelevant. There are a myriad of reasons, many unrelated to the subject matter itself, why proposed legislation is not enacted, including the possibility that existing statutes provide adequate mechanisms to address the issue. The Legislature's failure to enact proposed legislation about maternal drug use does not indicate an intent to exclude a viable fetus from the homicide by child abuse statute, or to preclude application of the statute to pregnant women who kill their unborn, viable children by ingesting cocaine. Rather, the Legislature could well have determined that the proposed legislation was unnecessary because the abuse reporting laws, combined with the criminal child abuse and homicide by child abuse statutes, adequately address issues involving maternal drug use.

accuracy of the South Carolina Supreme Court's statutory construction analysis in McKnight's case.

McKnight contends that the existence of South Carolina's criminal abortion statute, S.C. Code §44-41-80 (2002),[14] mandates the conclusion that applying the homicide by child abuse statute in her case violates due process. Initially, McKnight did not raise this due process issue before the South Carolina Supreme Court. Rather, she asserted only that applying the homicide by child abuse statute to her in the face of the criminal abortion statute violated her equal protection rights by treating indifferent conduct more harshly than intentional conduct, and that it constituted cruel and unusual punishment (See Issue II below). Therefore, the issue of whether the existence of the criminal abortion statute somehow deprived McKnight of notice that she could be prosecuted under the homicide by child abuse statute was not presented to the South Carolina Supreme Court, and is not properly before this Court. *See Durley v. Mayo*, 351 U.S. 277, 281 (1956) (particular federal issue must have been presented to the highest state court, and been necessary to that court's decision, before the Supreme Court will review the state court decision); *Stembridge v. Georgia*, 343 U.S. 541, 546 (1952) (where the highest court of the state was not asked to decide the particular constitutional issue, the United States Supreme Court has no occasion to consider it); *Bailey v. Anderson*, 326 U.S. 203, 206 (1945) (the United States Supreme Court does not have jurisdiction to decide issues that were not raised to and ruled on by the state court in the course of the proceedings).

---

[14]This statute provides that any women who solicits or procures any drug, medicine, prescription or substance, and administers it to herself with the intent to produce an abortion not otherwise permitted by law, is guilty of a misdemeanor punishable by up to two years in prison and a $1000 fine.

In any event, the existence of the criminal abortion statute is irrelevant to the issue of whether McKnight had sufficient notice that she could be prosecuted under the homicide by child abuse statute. As discussed above, in *Horne*, *Whitner*, and *Ard*, the South Carolina Supreme Court gave clear and unequivocal notice that a woman commits homicide if she kills her viable fetus by ingesting crack cocaine. *After* those opinions were issued, McKnight became pregnant, and ingested crack cocaine during her pregnancy to induce her own personal euphoria, without regard or concern for its effect on her child.[15] When her viable child died as a result of McKnight's cocaine use, she was clearly subject to prosecution for homicide by child abuse under well established South Carolina law.

Rather than indicate that the S.C. Legislature did not intend §16-3-85 to impose criminal liability on mothers who kill their viable fetuses by ingesting crack cocaine, the existence of the criminal abortion statute readily demonstrates the Legislature's willingness to hold mothers criminally responsible for harming their viable unborn children. Significantly, the Legislature passed §16-3-85 in the face of case law specifically holding that South Carolina's homicide laws encompass viable fetuses. Since §16-3-85 is a homicide statute, the clear implication is that the Legislature intended to include the killing of a viable fetus by child abuse within the statute's scope.[16]

---

[15]McKnight contends that her grief after the child was stillborn indicates her concern for the child's welfare. Virtually every parent is grief stricken at the death of a child, even those who physically beat the child to death, or allow the child to starve. Post-mortem grief does not prove concern for the child before its death, or mitigate the parent's role in causing that death.

[16]The mere fact that the criminal abortion statute provides for a misdemeanor conviction with a two year sentence, while the homicide by child abuse statute provides for life imprisonment, does not lead to the conclusion that the latter statute is unconstitutional. Harmelin v. Michigan, 501 U.S. 957,

All states, including South Carolina, have the sovereign right to make decisions regarding the protection of their citizens' health and welfare. The mere fact that other states have yet to protect viable fetuses from the harmful effects of their mother's ingestion of crack cocaine does not render South Carolina's efforts to do so unpredictable, or more importantly, unconstitutional under the Due Process Clause. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995) (one state's decision to permit brewers to disclose alcohol content on beer labels does not preclude neighboring states from effectively banning the disclosure of such information within their borders); *Harmelin*, 501 U.S. at 989-90 (opinion of Scalia, J.) (a state is entitled to criminalize acts that other states do not, and some state will always bear the distinction of treating particular offenders more severely than any other state). McKnight had ample notice that she was subject to criminal sanctions in South Carolina if her ingestion of crack cocaine injured her child, and as the South Carolina Supreme Court noted, she had all the notice she was constitutionally entitled to receive.[17]

988-89 (1991) (opinion of Scalia, J.) (when two offenses that appear to be "similarly grave" have significantly different penalties, the harsher penalty is not unconstitutional; rather, the legislature merely did not consider the offenses to be similarly grave). There is enormous variation, "even within a given age, not to mention across the many generations ruled by the Bill of Rights," in legislative determinations of what offenses are more serious than others. Id. at 987.

[17]McKnight's argument that the South Carolina Supreme Court's construction of the "extreme indifference to human life" element of the offense violated due process because it was "unprecedented" and "indefensible," was not presented to the South Carolina Supreme Court, and therefore, is not properly presented here. *See Durley*, 351 U.S. at 281(particular federal issue must have been presented to the highest state court, and been necessary to that court's decision, before the Supreme Court will review the state court decision). The only issue McKnight raised in the South Carolina courts regarding the "extreme indifference" element was sufficiency of the evidence to establish that she acted with extreme

B. Petitioner Does Not Have Standing to Challenge the Statute as Void for Vagueness.

McKnight also argues that the South Carolina Supreme Court's construction of the homicide by child abuse statute rendered the statute void for vagueness. In support of this argument, McKnight takes the Court's holding out of context, and ignores the undisputed facts of this case on which the Court's holding was specifically based.

The first fallacy in McKnight's argument is her contention that the South Carolina Supreme Court broadly interpreted the statute to authorize punishment for any "pregnancy activity" known to be potentially fatal to the fetus. On the contrary, rather than interpret the statute as applying to "pregnancy activity" in general, the Court specifically stated only that in light of the *Whitner* decision, "the statute clearly applies to a stillbirth caused by ingestion of cocaine." (Pet. App., pp. 13a-14a).

The fact that the statute might be interpreted to apply to other behaviors is irrelevant to a void for vagueness analysis when the instant conduct falls squarely within the "hard core" of the statute's application. *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973). "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before

---

indifference to human life. (Final Brief of Appellant, pp. 14-17). She never contended the statutory language was unconstitutionally vague, nor did she seek a rehearing on this issue. Further, rather than being "unprecedented" and "indefensible," in construing the language at issue in this case, the South Carolina Supreme Court specifically relied on South Carolina precedents construing similar mental states, and its conclusion was consistent with that precedent. (Pet. App. pp. 5a-8a).

the Court." Id. at 610; *see also Parker v. Levy*, 417 U.S. 733, 755-56 (1974) (a defendant who is squarely within the terms of a statute as stated by the enacting body, or as authoritatively construed, does not have standing to challenge the vagueness of the statute even though the statute's hypothetical application to other behavior is uncertain); *Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591, 576 (2001), *cert. denied* 535 U.S. 926 (2002) (a defendant does not have standing to challenge the constitutionality of a statute on the ground that it invades the constitutional rights of others).

McKnight sets forth the same "parade of horribles" asserted in the *Whitner* case, and makes dire predictions regarding hypothetical prosecutions based on conduct ranging from work-related chemical exposure to failing to take prenatal vitamins. As in *Whitner*, McKnight's "parade of horribles" and hypothetical cases are simply irrelevant since her conduct was clearly within the type of conduct contemplated by the statute.[18] *See* Janssen, *Fetal Rights and the Prosecution of Women for Using Drugs*

---

[18]McKnight's dire predictions of massive prosecutions against pregnant women who give birth to stillborn infants are seriously undermined by the fact that there have been very few such prosecutions in South Carolina in the nineteen years since *Horne* was decided, the eleven years since §16-3-85 was enacted, the six years since *Whitner* was decided, the two years since McKnight was tried and convicted, or the six months since the South Carolina Supreme Court affirmed her conviction. In short, such "pregnancy police" predictions are "unrealistic at best." Schueller, *The Use of Cocaine by Pregnant Women: Child Abuse or Choice?*, 25 J. Legis. 163, 174-75 (1999) (hereinafter "*Use of Cocaine*"). The strength of a "parade of horribles" argument is directly proportionate to the certainty that the constitutional provision was meant to exclude the very evil represented by the imagined parade; and the probability that the parade will in fact materialize. *Harmelin*, 501 U.S. at 986 n. 11 (opinion of Scalia, J.). Even assuming the Due Process Clause was meant to exclude prosecution in the various situations of McKnight's "parade of horribles," the parade she proposes simply has not materialized in South Carolina.

During Pregnancy, 48 Drake L. Rev. 741, 763 (2000) (hereinafter "*Fetal Rights*") (law does not have capacity to treat all behaviors that may produce a particular result the same, and the mere fact that some bad behaviors are beyond reach of the legal system does not mean society should not seek to punish those that are within the system's reach).

McKnight's contention that the statute is void for vagueness because it authorizes and encourages arbitrary enforcement was not presented to the South Carolina Supreme Court, and therefore, is not properly before this Court. *See Durley*, 351 U.S. at 281 (particular federal issue must have been presented to the highest state court, and been necessary to that court's decision, before the Supreme Court will review the state court decision). In any event, McKnight's argument fails because on its face, the homicide by child abuse has very explicit requirements for prosecution which significantly limit prosecutorial discretion.[19]

First, contrary to McKnight's assertion that the homicide by child abuse statute encompasses acts or omissions with known "*potential*" to result in stillbirth, the statute expressly requires an act or omission "which causes harm to the child's physical health or welfare." (Pet. App., p. 24a) (emphasis added).[20] Thus, the mere "potential" for harm is insufficient, and there must be evidence of actual harm to the child from the acts or omissions at issue.

---

[19]The effect of these limitations in connection with prosecutions against pregnant women under the statute is amply demonstrated by the small number of such prosecutions in South Carolina. *See* n. 17 above.

[20]The reference is to the statute as amended in 2000, which the parties agreed at trial would apply to this case. (R., pp. 442-443).

Second, the harm to the child must have been caused by by "circumstances manifesting extreme indifference to human life." As construed by the South Carolina Supreme Court, this *mens rea* element requires evidence of a "mental state akin to intent characterized by a deliberate act culminating in death," "indifference to the consequences of one's acts," "a conscious failure to exercise due care or ordinary care, or a conscious indifference to the rights and safety of others or a reckless disregard thereof." (Pet. App., pp. 6a-7a)(citations omitted). The *mens rea* requirement readily distinguishes the statute from the legislation at issue in *City of Chicago v. Morales*, 527 U.S. 41 (1999) (ordinance that subjected people to criminal liability for loitering without regard to their intent was void for vagueness because it vested virtually all authority in the police to determine what activities constituted loitering).

Finally, in cases involving a stillbirth, the State must prove that the child was viable at the time of its *in utero* death. This will require medical expert testimony regarding the child's stage of development, and whether the child could have lived separate and apart from its mother.

McKnight had sufficient notice that her ingestion of crack cocaine could subject her to criminal prosecution if it caused harm to her child, and the explicit elements of the homicide by child abuse statute provide sufficient guidance to law enforcement to preclude arbitrary prosecution of mothers simply because their children are stillborn. Therefore, the statute is not void for vagueness.

C. Application of the Statute in this Case Did Not Violate Substantive Due Process.

In a poorly disguised attempt to bring the abortion controversy into this case, McKnight contends that applying the

homicide by child abuse statute in her case violates her substantive due process right to procreate and carry her pregnancy to term. The fallacy of this argument is clear.

Under *Roe v. Wade* and its progeny, the State of South Carolina has a compelling interest in protecting the life of a viable child. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 870-71 (1992) (*Roe* established that at the point of viability, the state's right to protect the child overrides the rights of the woman); *Webster v. Reproductive Health Services*, 492 U.S. 490, 519 (1989) (state has interest in protecting potential human life); *Roe v. Wade*, 410 U.S. 113, 162-63 (1973) (state has important and legitimate interest in preserving and protecting the potentiality of life, which grows in substantiality as the woman approaches term, and at a point it becomes "compelling"). On the contrary, McKnight has no fundamental right, or even protectable interest, to use crack cocaine, either before, during, or after her pregnancy.

McKnight made a conscious decision to carry her child to term, and then continued to ingest crack cocaine which directly caused her viable child's death. Having exercised her right to procreate, and decided to carry the child to term, McKnight assumed certain duties and obligations to her child, and the State's interest in protecting the child once it reached viability was clearly paramount to McKnight's non-existent right to ingest crack cocaine.[21] *See State v. McKnight*, Pet. App., p. 11a (having made the choice to have the child, the mother must accept the duties and obligations to the child arising from her choice, and if she fails to fulfill those obligations, the state must step in to

---

[21]McKnight's attempt to couch the issue in terms of regulation of the all prenatal activities is unavailing. The sole issue in this case is the State's interest in protecting a viable child from harm caused by the mother's ingestion of cocaine.

prevent harm to the child); *Fetal Rights*, 48 Drake L. Rev. at 762 (once mother has made the choice to have a child, she must accept the consequences and obligations that her choice creates).

McKnight advances the policy argument that fear of prosecution will deter pregnant drug users from seeking prenatal care or drug treatment. Initially, such policy issues are better addressed to the legislature. *See Ewing v. California*, 123 S.Ct. 1179, 1187 (2003) (plurality opinion) (Court has a longstanding tradition of deferring to state legislatures in making and implementing important policy decisions); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959) (policy decisions are for the legislature).

Further, there is no evidence that fear of prosecution after *Whitner*, when the possibility of criminal prosecution for causing harm to a viable child through the use of crack cocaine was established beyond any doubt, has caused pregnant drug users in South Carolina to avoid prenatal care or drug treatment.[22] More

---

[22]The *amicus* parties before the South Carolina Supreme Court contended that the *Whitner* decision caused a decline in admissions to substance abuse treatment programs and an increase in South Carolina's infant mortality rates. (Brief *Amici Curiae* of the South Carolina Medical Association, et al., pp. 34-35). As support for this contention, however, they presented nothing more than an undocumented inference that *Whitner*, rather than other societal factors, caused those occurrences. *See Fetal Rights*, 48 Drake L. Rev. at 764 (impact of fear of imprisonment on obtaining prenatal care may be exaggerated, and no direct causative link has been established); *Use of Cocaine*, 25 J. Legis. at 171-74 (deterrent effect of prosecuting pregnant drug users for harming their viable fetuses is impossible to accurately calculate, while harmful effects of maternal drug abuse are certain); Coady, *Extending Child Abuse Protection to the Viable Fetus: Whitner v. State of South Carolina*, 71 St. John's L. Rev. 667, 687 (1997) (the reality is that crack addicts do not put a priority on getting medical care for their unborn children, and reasons other than fear of prosecution may prevent them from seeking proper medical care). Further, assuming that pregnant drug users in South Carolina have decided to forego prenatal care because of the *Whitner* decision

importantly, there is no evidence that McKnight herself made any effort to get drug treatment, even though she knew she was pregnant, or that she did not seek treatment due to a fear of prosecution.[23]

As evidenced by the *amici* briefs submitted in the South Carolina Supreme Court, law enforcement officials are well aware there are drug treatment centers in South Carolina. If the State wanted to prosecute any pregnant drug user simply because she is a drug user, those centers would be a ready source of defendants. The fact that the State has not initiated such proceedings reveals that it has no interest in prosecuting a pregnant drug user who actively seeks treatment for her drug problem, and attempts to get proper prenatal care to prevent her drug use from harming her unborn child.[24]

The State's compelling interest in protecting a viable child from harm is well established. Application of the homicide by child abuse statute to mothers who kill their unborn, viable children by ingesting cocaine legitimately furthers the State's interest, and is well supported by due process jurisprudence.

---

conclusively undermines McKnight's contention she did not have adequate notice that she could be prosecuted for harm caused to her child by her drug use.

[23]The only reference to drug treatment was defense counsel's assertion at sentencing that McKnight had been homeless since she started using drugs, and she "really didn't have access to , or the ability to be in a real drug program that would have assisted." (R. p. 388). There is absolutely no evidence that McKnight ever tried to get help for her drug use.

[24]Rather than pose a deterrent to prenatal care, the fact that the State has not sought to prosecute pregnant drug users who seek treatment and prenatal care should serve as an incentive to such women, and encourage them to seek help.

D. The South Carolina Supreme Court Applied an Appropriate Standard of Review.

McKnight also contends that the South Carolina Supreme Court applied an unconstitutional standard of review in affirming her conviction. She argues that the Court used an "any evidence" standard, rather than a standard requiring evidence that could reasonably support a finding of guilt "beyond a reasonable doubt."

As a threshold matter, this issue is not preserved for review by this Court. In her brief to the South Carolina Supreme Court, McKnight cited South Carolina cases for the standard of appellate review in criminal cases, and did not assert that South Carolina's standard of review was unconstitutional. (Final Brief of Appellant, pp. 8-9). After the opinion was issued affirming her conviction, McKnight did not seek rehearing on the ground that the standard of review used by the South Carolina Supreme Court violated due process.

When the highest state court has failed to decide a federal question, it will be assumed that the omission was due to the party's failure to properly present the question in the state courts. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n. 3 (1983) (citing *Fuller v. Oregon*, 417 U.S. 40, 50 n. 11 (1974)); *see also Durley*, 351 U.S. at 281 (before the United States Supreme Court will review a decision of a state court, it must affirmatively appear from the record that the particular federal issue was presented to the highest court of the State, and that its determination of the federal question was necessary to its decision). Nothing in the record in this case indicates that any issue regarding the constitutionality of South Carolina's standard of review in criminal cases was presented to, or decided by, the South Carolina Supreme Court. Thus, this Court does not have jurisdiction to consider this issue.

In any event, the standard of review applied by South Carolina's appellate courts is consistent with *Jackson v. Virginia*, 443 U.S. 307 (1979). *Jackson* held that when reviewing a criminal conviction, the appellate court must determine whether in viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. 443 U. S. at 319. While the South Carolina Supreme Court did not use the precise language "beyond a reasonable doubt" in connection with its standard of review, that requirement is clearly encompassed in the standard applied.

In South Carolina, a defendant is entitled to a directed verdict of acquittal when the State fails to produce evidence "of the offense charged," and the evidence must do more than raise a suspicion of guilt. *State v. McHoney*, 344 S.C. 85, 544 S.E.2d 30 (2001); *State v. Mitchell*, 341 S.C. 406, 535 S.E.2d 126, 127 (2000). On appeal, the reviewing court must view the evidence in the light most favorable to the State, and determine if there is any direct evidence, or substantial circumstantial evidence, reasonably tending to prove the defendant's guilt, or from which his guilt may be fairly and logically deduced. *E.g., State v. Lollis*, 343 S.C. 580, 541 S.E.2d 254, 256 (2001); *State v. Pinckney*, 339 S.C. 346, 529 S.E.2d 526 (2000).

Contrary to McKnight's contention, the standard of review applied by the South Carolina Supreme Court is not an "any evidence" standard. If such were the case, evidence that raises nothing more than a "suspicion" of guilt would be sufficient. Rather, the requirement that the evidence be sufficient to "reasonably" tend to "prove" the defendant's "guilt," or from which his "guilt" may be "fairly and logically" deduced, implicitly incorporates the "beyond a reasonable doubt" component of the *Jackson* standard. *See State v. Robinson*, 310 S.C. 535, 426 S.E.2d 317, 319 (1992) (a finding that the evidence

reasonably tends to prove the defendant's guilt means that any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt) (citing *Jackson*); *State v. Hudson*, 277 S.C. 200, 285 S.E.2d 773, 775 (1981) (there was evidence from which a reasonable trier of fact could conclude beyond a reasonable doubt that the defendant possessed heroin with intent to distribute) (citing *Jackson*).

II. Application of South Carolina's Homicide by Child Abuse Statute in this Case Does Not Constitute Cruel and Unusual Punishment.

McKnight contends her punishment in this case constitutes cruel and unusual punishment, because every other jurisdiction that has considered the question would not treat her conduct as a criminal offense. McKnight also argues that since she could have received a maximum two year sentence for the "same harm" caused to the viable fetus by intentionally terminating her pregnancy, this calls into question the merits of the South Carolina Supreme Court's reasoning to uphold her greater sentence for "indifference" to a viable fetus, which McKnight asserts is less culpable.

The Eight Amendment does not require strict proportionality between the crime and the sentence imposed, and forbids only extreme sentences that are "grossly disproportionate" to the crime. *Ewing v. California*, 123 S.Ct. at, 1186-87 (plurality opinion) (citing *Harmelin*, 501 U.S. at 1001, opinion of Kennedy J., concurring in part and concurring in judgment). Intrajurisdictional and interjurisdictional comparisons are only appropriate when a threshold comparison of the crime committed and the sentence imposed leads to an inference of "gross disproportionality." *Harmelin*, 501 U.S. at 1005 (opinion of Kennedy, J., concurring in part and concurring in the judgment); *see also State v. Brannon*, 341 S.C. 271, 533 S.E.2d 345 (Ct.

App. 2000) (court need only do a threshold comparison of the gravity of the offense against the severity of the sentence). Reviewing courts "should grant substantial deference" to the legislature's broad authority in determining the types and limits of punishments for crimes. *Harmelin*, 501 U.S. at 999 (opinion of Kennedy, J.).

In this case, McKnight was charged with homicide by child abuse of her unborn child. As the South Carolina Supreme Court correctly noted, McKnight's potential penalty was no harsher than that imposed on any other individual charged with murder. (Pet. App., p. 15a).

Although other states have not yet defined a viable fetus as a child for purposes of criminal prosecution of a pregnant mother, many states do impose severe sentences on those guilty of neglect or murder of a child. (Pet. App., p. 16a). The mere fact that South Carolina stands alone in protecting a viable fetus from death resulting from its mother's illegal drug use does not render its decision to do so cruel and unusual punishment. *Harmelin*, 501 U.S. at 989-90 (opinion of Scalia, J.) (state may criminalize acts that other states do not, and some state will always bear the distinction of treating certain offenders more severely than any other state).

McKnight's argument that her punishment for homicide by child abuse was unconstitutional when compared to the misdemeanor treatment of the intentional termination of a pregnancy is also unavailing. Initially, the South Carolina Supreme Court found that this issue was procedurally barred under South Carolina law because it was not specifically raised in the trial court. (Pet. App., pp. 16a-17a). *See, e.g.*, *In re McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001)(a constitutional claim must be raised and ruled on in the trial court to be preserved for appellate review). Since the state procedural bar is

independent of the constitutional question presented, and adequately supports the South Carolina Supreme Court's decision, this Court should not consider the issue. *Ulster County Court v. Allen*, 442 U.S. 140 (1979).

In any event, every difference in punishment among criminal statutes is not subject to constitutional scrutiny. As developed in South Carolina law, the homicide by child abuse statute encompasses abusive conduct that results in a child's death, including the death of a viable fetus. McKnight's ingestion of crack cocaine that caused her child's *in utero* death fell squarely within the conduct proscribed by that statute.[25]

Determining sentencing rationales is generally a policy choice to be made by state legislatures. *Ewing*, 123 S.Ct. at 1187 (plurality opinion). Such policy determinations may change over time in light of changing societal norms. *See Harmelin*, 501 U.S. at 987-88 (opinion of Scalia, J.) (determination of what offenses are more serious vary enormously within a given age and across generations). The tradition of giving great deference to legislative policy decisions regarding criminal sentences recognizes the myriad of factors inherent in making those decisions. *See Ewing*, 123 S.Ct. at 1187 (plurality opinion) (citations omitted).

McKnight's Eighth Amendment argument is premised on a comparison of incomparable statutes, and the decisions of other states that are irrelevant. A twenty year sentence is not constitutionally excessive for the crime of homicide, and thus, there is no inference of "gross disproportionality" that would give rise to intrajurisdictional or interjurisdictional comparisons, and McKnight's sentence was not cruel and unusual.

---

[25]McKnight's conduct did not fall within the express statutory elements of South Carolina's abortion laws. Therefore, she could not have been prosecuted under those laws.

CONCLUSION

Based on the foregoing, there are no issues in this case that warrant review by this Court, and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General for the
State of South Carolina

JOHN W. McINTOSH
Chief Deputy Attorney General

CHARLES H. RICHARDSON
Assistant Deputy Attorney General

NORMAN MARK RAPOPORT
Senior Assistant Attorney General

DEBORAH R.J. SHUPE
Counsel of Record
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

COUNSEL FOR RESPONDENT

July 29, 2003

No. 02-1741

IN THE

Supreme Court of the United States

REGINA D. MCKNIGHT,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

REPLY BRIEF FOR PETITIONER

LYNN M. PALTROW
NATIONAL ADVOCATES FOR PREGNANT WOMEN
153 Waverly Place
6th Floor
New York, NY 10014
(212) 255-9252

DAVID T. GOLDBERG
Counsel of Record
99 Hudson Street
8th Floor
New York, NY 10013
(212) 334-8813

C. RAUCH WISE
ACLU OF SOUTH CAROLINA FOUNDATION, INC.
305 Main Street
Greenwood, SC 29646
(864) 229-5010

Attorneys for Petitioner

Table of Contents

Table of Authorities ii

A. The Case Raises Broadly Important Due Process Questions Warranting This Court's Review 1

B. Petitioner's Cruel And Unusual Punishment Claim Warrants Review 10

Table of Authorities

Federal Cases

Bouie v. City of Columbia, 378 U.S. 347 (1964) .. 2, 3, 4, 7

Ferguson v. City of Charleston, 532 U.S. 67 (2001). ... 10

BMW of North America, Inc. v. Gore,
517 U.S. 559 (1996) 3

City of Chicago v. Morales, 527 U.S. 41 (1999) 5, 7, 8

Douglas v. Buder, 412 U.S. 430 (1973) (per curiam) 3

Durley v. Mayo, 351 U.S. 277 (1956) 3, 8

Elder v. Holloway, 510 U.S. 510 (1994) 3

Enmund v. Florida, 458 U.S. 782 (1982) 2, 10

Ewing v. California, 123 S. Ct. 1149 (2003) 10

Ford v. Georgia, 498 U.S. 411 (1989) 3

Kolender v. Lawson, 461 U.S. 352 (1983) 5

Michigan v. Long, 463 U.S. 1032 (1983) 3

Osborne v. Ohio, 495 U.S. 103 (1990) 7

Planned Parenthood, S.E. Pa. v. Casey,
505 U.S. 833 (1992) 9, 10

Stembridge v. Georgia, 343 U.S. 541 (1952) 3

State Cases

Collins v. Texas, 890 S.W.2d 893 (App. 1994) 4

Florida v. Ashley, 701 So. 2d 338 (1997) 4

Reinesto v Superior Court,
894 P.2d 733 (Ariz. App. 1995) 6

South Carolina v. Ard, 332 S.C. 370,
505 S.E.2d 328 (1998) 3

South Carolina v. Horne,
282 S.C. 444, 319 S.E.2d 703 (1984) 3, 4

Stallman v. Youngquist, 531 N.E.2d 355 (Ill. 1988) ... 4, 9

Whitner v. State, 328 S.C. 1 (1997) 3, 4

Wyoming v. Osmus, 276 P.2d 469 (1954) 2, 3, 4

State Statutes

S.C. Code § 16-3-85 ..... *passim*

S.C. Code § 44-41-80 ..... *passim*

Other Materials

Campaign for Tobacco-Free Kids, Harm Caused by
Pregnant Women Smoking 7

REPLY BRIEF FOR PETITIONER

Respondent chiefly (1) argues that the construction imposed on § 16-3-85 by the South Carolina Supreme Court majority was not so novel or indefensible as to deny McKnight Due Process and (2) emphasizes that the large majority of South Carolina stillbirths (*i.e.*, those where use of illicit drugs is not suspected) continue to be treated by prosecutors as "trag[edies]" (Opp.9), rather than homicides.

Respondent's efforts to minimize the legal and practical significance of the decision below are powerfully refuted by the submission of the American Public Health Association and 26 other organizations, and as we explain below, neither the Opposition's defense of the merits of the decision below, nor its recurring, but desultory, assertions that federal constitutional questions are not properly presented – warrants denying review.

A. The Case Raises Broadly Important Due Process Questions Warranting This Court's Review

1. Without denying that § 16-3-85 had never before been interpreted to authorize punishment of a woman who suffers a stillbirth, on the theory that fetal demise was her "fault" (Opp.9), Respondent maintains that prior South Carolina decisions interpreting the terms "person" and "child" in particular statutes to include a viable fetus (Opp.10-11), render the construction below "[]expected and []defensible."

a. Respondent almost entirely avoids what should be central in the Due Process analysis: the patent implausibility that the State Legislature intended its 1992 enactment to punish women who suffer stillbirths linked to drug use during pregnancy. Sustaining application of the statute – which passed unanimously – required the court below to assume: (1) that *every* legislator who voted against other, less draconian measures proposed to address drug use by pregnant women (*see* Pet.14), nonetheless voted to punish (as homicide) drug ingestion resulting in a stillbirth; and (2) that the Legislature enacted two laws addressing fetal demise resulting from drug ingestion late in pregnancy: one,

§ 44-41-80, which punishes doing so with *specific intent* as a misdemeanor, and a second, § 16-3-85, which (without mentioning pregnancy, fetuses or drugs) makes similar action, when resulting in *unintended* pregnancy loss, punishable by life imprisonment.

i. The generic proposition that proposed legislation can fail for "myriad * * * reasons" (Opp.14 n.13) is no answer here. The point is not only that these many proposals were voted down, but that the same legislators who led the opposition – and left no doubt that they saw a punitive approach as inimical to public health, unanimously supported § 16-3-85.[1]

ii. The incompatibility of the decision below with the abortion statute cannot be defended as a "legislative determination" (Opp.17 n.16) that the offense with which Petitioner was charged is "more serious," *id.*, than that punished under § 44-41-80(b). There is no evidence of any such determination, and no known penological theory supports punishing the same harm-causing activity far *more harshly* if the result was *un*intended. *See Enmund v. Florida*, 458 U.S. 782, 800 (1982).[2]

---

[1]Respondent (Opp.13-14) directs the Court to the Legislature's "failure," *id.*, to more explicitly disavow the *Whitner* decision when it amended § 16-3-85 in 2000. Those developments have no relevance to the Due Process question, *see Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964), but they may not, in any event, be construed as expressing *approval* of *Whitner*. The Legislature *deleted* from § 16-3-85 a cross-reference to the statutory provision construed in *Whitner*, and in the course of considering the amendment, legislators clarified that the statute "pertained" only when "a child is * * * already born." Tr. Debate on H.3555, Judiciary Committee of the South Carolina House of Representatives at 5 (Feb. 8, 2000) (Rep. Jennings) (unofficial transcript from audiotape obtained from Clerk of House of Representatives).

[2]The suggestion that "the issue of whether the existence of the abortion statute somehow deprived McKnight of notice," Opp.15, has been waived slices Petitioner's constitutional rights far too thinly. The claim – made by Petitioner at every level – is that the application of § 16-3-85 to her case was "unexpected and indefensible." As in *Bouie*, the existence of

b. The South Carolina Supreme Court's decisions in *Horne, Whitner* and *Ard* obviously do not provide "clear and unequivocal notice that a woman commits homicide" when a stillbirth is linked to drug ingestion while pregnant. Opp.16. *Whitner* was not a homicide case – the decision arose from an attempt to withdraw a misdemeanor guilty plea – and neither *Ard* nor *Horne* addressed a *pregnant woman's* causing fetal demise, let alone her doing so, unintentionally, "by ingesting crack cocaine" *See Ard*, 332 S.C. at 374 (defendant shot pregnant victim in the forehead, having previously expressed an intention to kill); *Horne*, 282 S.C. at 446 (defendant, intending to kill estranged wife, stabbed her in neck and abdomen, causing demise of near-term fetus).[3]

c. Previous South Carolina cases had stressed that decisions whether to construe the term "child" or "person" as encompassing fetuses must be made in the context of the particular statute at issue. *See Whitner*, 328 S.C. at 6 ("The

---

a different statute "dealing specifically," 378 U.S. at 359 n.7, with maternal responsibility for late-term fetal demise renders the construction imposed below "all the more untenable," *id.* *See also* Pet App. 21a (Moore, J., dissenting) (citing statute as evidence that Legislature could not "could not have * * * intended" to prosecute a woman for causing fetal demise); *cf. Elder v. Holloway*, 510 U.S. 510 (1994).

At all events, defense counsel *did* call the specific statutory provision to the trial court's attention more than once, *see* Pet.7 n.4, including during an omnibus argument on Petitioner's pretrial motions. *See Ford v. Georgia*, 498 U.S. 411, 418 (1989).

The precedents the State identifies as barring the Due Process argument, *see* Br. Opp.15 (citing *Durley v. Mayo*, 351 U.S. 277 (1956), and *Stembridge v. Georgia*, 343 U.S. 541 (1952)), have no application to this case. They involve the presumption against jurisdiction in cases "[w]here the highest court of the state *delivers no opinion* and it appears that the judgment might have rested upon a nonfederal ground," *id.* at 547 (emphasis added); *compare Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

[3] *Bouie* and progeny settle that notice that activity is prohibited, *e.g.*, that drug use was "already illegal," does not in itself satisfy Due Process. *See, e.g., Douglas v. Buder*, 412 U.S. 430 (1973) (*per curiam*); *BMW v. Gore*, 517 U.S. 559, 574 (1996) (fairness"dictate[s] "that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that State may impose").

question * * * is whether a viable fetus is a 'person' *for purposes of the Children's Code*") (emphasis added); *id.* at 21 (Finney, C.J., dissenting) (noting recent decision construing "child" to mean "child in being and not a fetus").[4]

d. The distinction Respondent (and the State Supreme Court majority) would brush aside – between fetal demise that results from a third party's attack on a pregnant woman and that which ensues from a woman's activity during pregnancy – is one with deep roots in the Anglo-American legal tradition, *see Wyoming v. Osmus*, 276 P.2d 469 (1954), and it remains broadly and consistently adhered to, *see, Florida v. Ashley*, 701 So. 2d 338 (1997) (collecting cases from 21 States); *see Bouie*, 378 U.S. at 361 (South Carolina Supreme Court's enlargement of trespassing statute was "inconsistent" with "traditional American law").

Courts throughout the Nation – with bodies of precedent fundamentally similar to the South Carolina case law cited by Respondent – have held that the leap from third-party liability for fetal harm to *maternal* liability for activity during pregnancy is unwarranted and/or impermissible, as a matter of Due Process. *See* Pet.15 (discussing *Ashley*, *Collins v. Texas,* 890 S.W.2d 893 (App. 1994), and *Stallman v. Youngquist,* 531 N.E.2d 355 (Ill. 1988)).

The traditional distinction is one the *South Carolina Legislature* adheres to. Thus, § 44-41-80 prescribes a heavier penalty for a third party who "administers a drug" with the intent of causing fetal demise late in pregnancy, *see id.* § (a), than for a woman who self-administers the same drug for the same purpose and with the same result, *id.* § (b).

2. The Petition and *Amicus* Brief explain that the range of activity that can give rise to punishment under the construction adopted below is vast – and the seeming terms

---

[4]The court in *Horne* invoked its "right and * * * duty to develop the *common law* of South Carolina," 282 S.C. at 447 (emphasis added), to fashion a crime of "feticide" – and *reversed* the conviction, because no prior "South Carolina decision had held that killing of a viable human being *in utero* could constitute a criminal homicide," *id.* (citing *Bouie*).

of limitation, "public knowledge" of "potential" to cause fetal demise, are so imprecise as to supply no meaningful guidance at all. As a result, prosecutors (and, in practice, health care providers) are vested with authority to determine which stillbirths the law will treat as "tragic" (Opp.9) and which ones will be investigated or punished as homicides.

Respondent's principal answer (Opp.19 n.18), that prosecutions have not targeted stillbirths linked to the full range of "potentially fatal" pregnancy activity – *i.e.*, that "the parade of horribles" has "not materialized" – simply misses the Due Process point.

a. Vagueness analysis looks to the *statute* – as authoritatively construed by the State Supreme Court, *see Kolender v. Lawson*, 461 U.S. 352, 355 n.4 (1983) – not to predictions or assurances as to how it will be enforced. *Cf. City of Chicago v. Morales*, 527 U.S. 41, 63 (1999) ("That the police have adopted internal rules limiting their enforcement to certain designated areas would not provide a defense to a loiterer * * * arrested elsewhere").

The opinion below did not (and could not) decide that the homicide law reaches *only* fetal harm that results from ingestion of "already illegal" substances. Pet.App.14a. Instead, as now construed, the statute targets any harm-causing "act or omission," 16-3-85(B)(1), whose "potential[]" to result in pregnancy loss is a matter of "public knowledge." Indeed, the decision expressly identifies "failing to supply the child with adequate health care" – an omission that has nothing to do with drug use – as a provision that "may clearly be applied to an unborn child." Pet.App.9a.

b. The open-endedness of the statute, as construed, is not of Petitioner's hypothesizing. The Chief Prosecutor for the county from which this case arose publicly warned that homicide charges would be filed "[e]ven if a legal substance is used," *see* Pet. 27, and, when the matter arose at oral argument in the State Supreme Court, Respondent's stance was hardly unequivocal:

The Court: Well who doesn't know cigarettes can cause

> harm to a fetus * * * ? That's pretty common knowledge too, isn't it?
>
> A: It is, and I, but the case may be that the court, the state could under certain circumstances prosecute someone.
>
> The Court: So we are going there.
>
> A: I think each case depends on its own merit, depends upon the facts of the case, depends the level of callousness, the level of recklessness. But I don't think this court even has to go there. You look at the facts of this case and the facts of this case are quite strong.

Tr. Oral Arg. (Nov. 6, 2002) (from official audiotape).

c. Respondent (Opp.20) faults the petition for overlooking that punishment is limited to activity that causes "actual harm," *i.e.*, stillbirth, rather than that which had the "potential" to lead to pregnancy loss.[5] To be sure, this "limitation" reduces the absolute number of women who ultimately could be prosecuted, *see* R. 305 (acknowledging that babies are born alive with twice the amount of cocaine derivative found in Petitioner's stillborn fetus), but it does not mitigate the statute's *vagueness* problem in the least.[6]

The focus on "potential" to harm derives directly from the opinion below, which holds homicide prosecution *in the event of a stillbirth*, to be permissible, whenever it results from acts (or omissions) "publicly know[n]" to be "potentially fatal" to a fetus. The Due Process problem relates to the basic indeterminacy of those terms. Medical experts *do not* accept that cocaine ingestion is more "potentially fatal" or its dangers, more "publicly known," than other activities. *See*

---

[5]Respondent's emphasis on causation as a limitation is not without irony, given the grave doubts, *see* Amicus Br. 11-14, about the "expert" testimony linking the pregnancy loss in this case to cocaine.

[6]*Cf. Reinesto v Superior Court*, 894 P.2d 733, 736 (Ariz. App. 1995) (if statute were extended "to prenatal conduct that affects a fetus in a manner apparent after birth – conduct that would be defined solely in terms of its impact on the victim – the boundaries of proscribed conduct would become impermissibly broad and ill-defined").

Amicus Br.15-16; Campaign for Tobacco-Free Kids, *Harm Caused by Pregnant Women Smoking* ("Smoking during pregnancy creates a more serious risk of spontaneous abortion * * * than using cocaine during pregnancy") (http://tobaccofreekids.org/research/factsheets/pdf/0007.pdf).

d. Respondent (Opp.21) would distinguish this case from *Morales*, on the ground that § 16-3-85 imposes a *mens rea* requirement (*i.e.*, "extreme indifference to human life") – a feature that can check arbitrary enforcement of vaguely-worded statutes. But as the petition explains (*id.* 18-20), the majority opinion's unprecedented interpretation of the "extreme indifference" language actually *worsens* the Due Process violation. Of the many decisions – from around the Nation – interpreting this commonly occurring statutory language, none has ever equated "extreme indifference" with activity that is merely "potentially fatal." *See* Pet.19 (citing cases requiring "exceptionally high" risk of death).[7]

e. As explained in the petition, assurances that prosecutors will not enforce the judicially-enlarged statute against many women whose stillbirths result from activities no less "potentially fatal" than Petitioner's are not a basis for *sustaining* it. A central constitutional defect of vague laws is that they "authorize and even encourage arbitrary and discriminatory enforcement." *Morales*, 527 U.S. at 56.

An approach that distinguishes between homicidal and "innocent" stillbirth based on the *means* by which fetal demise was caused has no support in the statutory text or even in the State Court's construction. § 16-3-85 surely would apply no differently to a parent's abusing a toddler with his or her fists than to harm inflicted with an implement or substance that happened to violate some other

---

[7]Respondent's waiver argument (Opp.18 n.17) rests on a misunderstanding: petitioner does not contend that "the *statutory language* is unconstitutionally vague," *id.* (emphasis added), but rather that the construction imposed *for the first time by the State Supreme Court* was unforeseeable. *See Bouie*, 378 U.S. at 352 (when uncertainty "is * * * not revealed until the court's decision," the violation can be "that much greater"); *cf. Osborne v. Ohio*, 495 U.S. 103, 124 (1990).

provision of positive law.

f. Respondent's attack on Petitioner's standing to raise vagueness objections (Opp.18-19) is irreconcilable with principles laid down in *Kolender* and *Morales*, and the assertion that Petitioner is a "hard core" violator (Opp.18) of the *Homicide By Child Abuse* statute is simply baffling.[8]

§ 16-3-85 is not directed at drug use, nor (to say the least) are women's activities while pregnant its prime focus. As explained above, the legislators who enacted the statute could not have *contemplated* its applying *at all* in a case like this one, *see* Pet.App.21a (Moore, J., dissenting), and many opposed – as overly punitive – far less draconian approaches.

If there *were* a statute addressing women's pregnancy-endangering activities, this case, which involves activity that (as an objective matter) does not pose an unusually high risk, *see* Amicus Br.16 – and specific causation evidence that is, at best, gossamer, *id.* – by an individual who had no intent to harm, would *still not* implicate its "hard core."[9]

3. Even as it faults Petitioner for "bring[ing] the abortion controversy into this case," Opp. 21, and professes umbrage at her describing the decision below as authorizing "regulation of pregnant women," (*id.*9), the Brief in

---

[8]Although Respondent argues, inventively, that Petitioner did not adequately preserve an "arbitrary enforcement" vagueness claim (Opp. 20), "the vagueness that causes notice to be inadequate is the very same vagueness that causes 'too much discretion' to be lodged in the enforcing officer." *Morales*, 527 U.S. at 95 (Scalia, J., dissenting). To the extent that *Durley v. Mayo* – the case Respondent cites as imposing an obligation to present the "*particular* federal issue," Opp. 20 (emphasis added) – addresses the requisite level of particularity, it is to precisely the opposite effect, *rejecting* arguments that the petitioner's failure to set forth "federal questions * * * as clearly as [he] might" have, 351 U.S. at 282, was reason to not entertain them.

[9]The description of Petitioner as ingesting cocaine "to induce her own personal euphoria" (Opp. 16) is not well taken: the State's experts made a clinical diagnosis of cocaine dependency, R. 406, and, as noted in the petition, treatment opportunities for someone in Ms. McKnight's position (homeless and pregnant) were, as a practical matter, nonexistent. Pet. 25 n.18 (noting estimated 100 treatment beds for 50,000 women in need).

Opposition claims a State power to impose "duties and obligations" on pregnant women (*id.*22), and cites this Court's abortion precedents *id.* (citing *Roe v. Wade*), as establishing this power to "step in" (*id.* 23) – and punish women, for homicide – in cases where "duties" are breached.

a. The cited cases establish no such State power. While recognizing a governmental interest "in potential life" strong enough to "regulate and even proscribe abortion," at fetal viability, *see Planned Parenthood v. Casey* 505 U.S. 833, 879 (1992) (though even that power must yield to a pregnant woman's health needs, *id.*), these precedents supply no general authority for imposing "duties" on pregnant women, for the benefit of "future children."

The controlling opinion in *Casey* rejected as plainly *un*constitutional a hypothetical law requiring that a woman *notify* her husband – whose "interest * * * in the growth and development of the fetus [the woman] is carrying," *see* 505 U.S. at 895, is surely as compelling as the State's – "before drinking alcohol or smoking" or "engaging in conduct causing risks to the fetus," *id.* at 898. *See also Stallman*, 531 N.E.2d at 359 (rejecting tort of maternal prenatal negligence). The principles that make civil liability – and even notification requirements – impermissible obviously limit a State's power to"step in," through imposition of heavy *criminal* punishment.

b. That Petitioner has "no fundamental right * * * to use crack cocaine" has no more bearing on the constitutional question than does the fact that the hypothetical "pregnant wife" in *Casey* would have no "right" to consume alcohol. McKnight was not punished under a statute prohibiting drug use. It is *Respondent*'s contention that she was convicted for breaching "duties" that arise from her "conscious decision to carry her [pregnancy] to term," Opp.22, and *Casey* leaves no doubt that government impositions on the exercise of that fundamental right must be subject to searching constitutional scrutiny, 505 U.S. at 859.[10]

---

[10]While making a token effort to contest the judgment of the American

B. Petitioner's Cruel And Unusual Punishment Claim Warrants Review

1. Respondent's main answer to the claim that McKnight's long prison term, for the unprecedented offense of causing her own pregnancy loss, violates the Eighth Amendment is that her sentence is not disproportionate to ones imposed elsewhere for "murder." (Opp.28). But that begs the constitutional question. *See Enmund*, 458 U.S. at 798 (issue "is not the disproportionality of death as a penalty for murder, but rather [its] validity [as] punishment for [defendant's] own conduct").

2. The deference recognized in *Ewing v. California*, 123 S. Ct. 1149 (2003), provides no basis for sustaining Petitioner's punishment. As *every other* State court of last resort to confront a similar case has recognized, *see* Pet.16, respect for legislative judgment – and Due Process – provide reason for *refusing* statutory enlargements like the one here.

The South Carolina *Legislature* did not decide to punish activity that *un*intentionally results in fetal demise vastly more harshly than that which does so purposefully; nor did that body resolve to abolish the venerable distinction between maternal and third-party liability. And, claims of acquiescence, *see supra* n.1, notwithstanding, the State Legislature's record respecting measures similar to – but far less extreme than – the one judicially imposed in this case has been one of consistent rejection.

* * * * *

For the reasons stated herein, as well as those in the petition and *Amicus* Brief, certiorari should be granted.

Medical Association, the American Public Health Association, the March of Dimes, and the American Society of Addiction Medicine (among many others), that the State Court's rules "harm * * * the cause of prenatal health," *Ferguson v. City of Charleston*, 532 U.S. 67, 81 n.23 (2001), *see* Opp.23 n.22 (citing contrary views of three law review commentators), Respondent does not even purport to show that the stillbirth-as-homicide regime is closely tailored to its claimed "compelling interest." Of course, the policy judgment Respondent accuses Petitioner of seeking to overturn (Opp.23) is not one ever made by South Carolina *Legislature*.

Respectfully submitted,

LYNN M. PALTROW
National Advocates for
Pregnant Women
153 Waverly Place, 6th Fl.
New York, NY 10014
(212) 255-9252

DAVID T. GOLDBERG
Counsel of Record
99 Hudson Street, 8th Fl.
New York, NY 10013
(212) 334-8813

C. RAUCH WISE
ACLU of South Carolina
Foundation, Inc.
305 Main Street
Greenwood, SC 29646
(864) 229-5010

Attorneys for Petitioner

AUGUST 2003

No. 02-1741

(3)

Supreme Court, U.S.
FILED
JUL 29 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

REGINA D. MCKNIGHT,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari to The Supreme Court of South Carolina

BRIEF OF *AMICI CURIAE* AMERICAN PUBLIC HEALTH ASSOCIATION, AMERICAN NURSES ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, NATIONAL STILLBIRTH SOCIETY, NATIONAL ASSOCIATION OF SOCIAL WORKERS, SOUTH CAROLINA MEDICAL ASSOCIATION, AMERICAN SOCIETY OF ADDICTION MEDICINE, NATIONAL ASSOCIATION OF NURSE PRACTITIONERS IN WOMEN'S HEALTH, MIDWIVES ALLIANCE OF NORTH AMERICA, SOUTH CAROLINA PRIMARY HEALTH CARE ASSOCIATION, PHYSICIAN LEADERSHIP ON NATIONAL DRUG POLICY, NAADAC: THE ASSOCIATION OF ADDICTION PROFESSIONALS, ASSOCIATION OF MATERNAL AND CHILD HEALTH PROGRAMS IN SUPPORT OF PETITIONER
[additional *Amici* listed on inside front cover]

JUDITH K. APPEL
DANIEL N. ABRAHAMSON*
DRUG POLICY ALLIANCE
717 Washington Street
Oakland, CA 94607
(510) 208-7711

Attorneys for *Amici Curiae*
**Counsel of Record*

42 pp

ADDITIONAL *AMICI*

BLACK WOMEN'S HEALTH IMPERATIVE,

ASSOCIATION OF REPRODUCTIVE HEALTH PROFESSIONALS,

NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE,

SOUTH CAROLINA NURSES ASSOCIATION,

SOUTH CAROLINA ASSOCIATION OF ALCOHOL AND DRUG ABUSE COUNSELORS,

CITIZENS FOR MIDWIFERY,

HYGEIA FOUNDATION, INC.,

INSTITUTE FOR HEALTH AND RECOVERY,

AMERICAN ACADEMY OF ADDICTION PSYCHIATRY,

GLOBAL LAWYERS AND PHYSICIANS,

PHYSICIANS FOR REPRODUCTIVE CHOICE AND HEALTH,

DOCTORS OF THE WORLD,

WOMEN'S LAW PROJECT,

FINDING COMMON GROUND, MAILMAN SCHOOL OF PUBLIC HEALTH, COLUMBIA UNIVERSITY

Table of Contents

Table of Authorities iii

Interests of *Amici Curiae* 1

Introduction 1

Reasons for Granting the Petition 3

I. Review Should Be Granted Because The McKnight Decision Threatens The Health Of All Child-Bearing Women In South Carolina 3

A. Given The Numerous Acts, Omissions And Conditions That Can Precipitate Stillbirth, The McKnight Decision Casts A Wide Net Of Potential Criminal Liability For Pregnant Women 4

B. The McKnight Decision Undermines Accepted Standards Of Care For Treating Women Who Suffer Stillbirth 8

II. Review Should Be Granted Because There Is No Reliable Medical Evidence That Ms. McKnight's Cocaine Use Caused Her Stillbirth 11

A. The Record Fails To Support South Carolina's Claim That Cocaine Caused McKnight's Stillbirth 11

B. There Can Be No "Public Knowledge" Of The Effects Of Prenatal Cocaine Ingestion When Medical And Scientific Research Is Inconclusive On This Point.... 15

III. Review Should Be Granted Because The McKnight Decision Will Deter Women From Obtaining Adequate Prenatal Health Care 16

Conclusion 20

Appendix

TABLE OF AUTHORITIES

Cases

Automobile Workers v. Johnson Controls, 499 U.S. 187 (1991) 6

Ferguson v. City of Charleston, South Carolina, 532 U.S. 67 (2001) 19

Jaffee v. Redmond, 518 U.S. 1 (1997) 18

State of South Carolina v. Regina D. McKnight, 576 S.E. 2d 168 (2002) ..... passim

Other Authorities

Addis, A. et al., *Fetal Effects of Cocaine: An Updated Meta-Analysis*, 15 Reprod. Toxicology 341 (2001)..... 12

American Academy of Pediatrics & American College of Obstetricians and Gynecologists, *Guidelines for Perinatal Care* 202 (4th ed. 1997) 11, 12

American Academy of Pediatrics, Committee on Substance Abuse, *Drug-Exposed Infants*, 86 Pediatrics 639 (1990). 19

American Medical Ass'n, *Legal Intervention During Pregnancy*, 264 JAMA 2663 (1990) 19

American Nurses Ass'n, *Position Statement* (Apr. 5, 1992) 20

American Psychiatric Ass'n, *Care of Pregnant and Newly Delivered Women Addicts: Position Statement* (March 2001) 20

American Society of Addiction Medicine, Board of Directors, *Public Policy Statement on Chemically Dependent Women and Pregnancy* (September 25, 1989) 19

Armstrong, M.A. et al., *Perinatal Substance Abuse Intervention in Obstetric Clinics Decreases Adverse Neonatal Outcomes*, 23 J. Perinatology 3 (2003)..... 18

Arnold, R. et al., *Medical Ethics and Doctor/Patient Communication, in The Medical Interview: Clinical Care, Education and Research* 365 (M. Lipkin, Jr. et al. eds., 1995)..... 18

Baca, K., *South Carolina spends the least on substance abuse prevention*, Associated Press State and Local Wire, Jan 29, 2001..... 17

Bernstein, J.G., *Handbook of Drug Therapy in Psychiatry* (2d ed. 1988)..... 7

Bingol, N. et al., *Teratogenicity of Cocaine in Humans*, 110 J. Pediatrics 93 (1987)..... 12, 13

Bove, K.E. & The Autopsy Committee of the College of American Pathologists, *Practice Guidelines for Autopsy Pathology*, 121 Archives Pathology & Laboratory Med. 368 (1997) 12

Campbell, T.A. & Collins, K.A., *Pediatric Toxicologic Deaths: A 10 Year Retrospective Study*, 22 Am. J. Forensic Med. & Pathology 184 (2001)..... 14

Chasnoff, I., *Drug Use in Pregnancy: Parameters of Risk*, 35 Pediatric Clinics N. Am. 1403 (1988)..... 17

Curry, C. & Honoré, L.H., *A Protocol for the Investigation of Pregnancy Loss*, 17 Clinics in Perinatology 723 (1990) 12

DeFrain, J. et al., *The Psychosocial Effects of Miscarriage: Implications for Health Professionals*, 14(3) Fam. Sys. & Health 331 (1996)..... 8

Division of Biostatics, South Carolina Department of Health & Environmental Control, *Table 52: Fetal Mortality and Fetal Mortality Rate by Race of Mother*, [1998] 1 Annual Vital Statistics Series 107..... 5

Ebrahim, S. H. & Gfroerer, J., *Pregnancy-Related Substances Use in the United States During 1996-1998*, 101(2) Obstetrics and Gynecology 374 (February 2003). 18

Eisenberg, A. et al., *What To Expect When You're Expecting* (2d ed. 1996)..... 9

Frank, D. et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613 (2001)..... 13, 15, 16

Fretts, R. et al., *Increased Maternal Age and the Risk of Fetal Death*, 333(15) New Eng. J. Med. 953 (1995)..... 6

Friedman, L., *A Woman Doctor's Guide to Miscarriage*, at xi-xii (Laurie Abkemeier ed., Hyperion 1996)..... 5, 9

Gaston, E., *Conway Homicide Case Sets Precedent*, The Sun News (Myrtle Beach, SC) May 19, 2001 4

Geerinck-Vercammen, C.R., *With a Positive Feeling: The Grief Process After Stillbirth in Relation to the Role of Professional Caregivers*, 87 Eur. J. Obstetrics & Gynecology and Reproductive Biology 119 (1999)..... 10

Hammersley, L. & Drinkwater, C., *The Prevention of Psychological Morbidity Following Perinatal Death*, 47 British Journal of General Practice 583 (September 1997) 8

Honein, M.A. et al., *Continued Occurance of Accutane-Exposed Pregnancies*, 64 Teratology 142 (2001) 7

Janssen, H. et al., *Controlled Prospective Study on the Mental Health of Women Following Pregnancy Loss*, 153 Am. J. Psychiatry 226 (February 1996) 8

Jones, K.L., *Smith's Recognizable Patterns of Human Malformation* 495 (J. Fletcher ed., 5th ed. 1997)..... 7

Kluger-Bell, K., *Unspeakable Losses* 146 (New York, WW Norton & Co. 1998)..... 10

Langhorne, T., *Solicitor: Woman's Cocaine Use Killed Fetus*, Spartanburg Herald Journal, May 3, 2003 19

Layne, L., *Motherhood Lost: Cultural Dimensions of Miscarriage and Stillbirth in America*, 16(3) Women & Health 69 (1990)..... 9

Malacrida, C., *Complicating Mourning: The Social Economy of Perinatal Death*, 9(4) Qualitative Health Research 504 (July 1999)..... 5

March of Dimes, *Statement on Maternal Drug Abuse* (Dec. 1990)..... 19

The Merck Manual of Diagnosis and Therapy (R. Berkow ed., 16th ed. 1992)..... 7

Morild, I. & Stajc, M., *Cocaine and Fetal Death*, 47 Forensic Sci. Int'l 181 (1990) 16

National Association of Public Child Welfare Administrators, *Guiding Principles for Working with Substance-Abusing Families and Drug-Exposed Children: The Child Welfare Response* (Jan. 1991) 19

National Center for Health Statistics, Center for Disease Control, *Births: Final Data for 2000*, 50(5) National Vital Statistics Report 27 (2002) *at* http://www.cdc.gov/nchs/data/nvsr/nvsr50/50_05_01.pdf 4

National Center for Health Statistics, Center for Disease Control, *Table 23: Infant Mortality Rates, in Health, United States, 2002* (2002) *available at* http://www.cdc.gov/nchs/data/hus/tables/2002/02hus023.pdf 4

National Council on Alcoholism and Drug Dependence, *Women, Alcohol, Other Drugs and Pregnancy* (1990) 20

Neugebauer, R. et al., *Association of Stressful Life Events With Chromosomally Normal Spontaneous Abortion*, 143 Am. J. Epidemiology 588 (1996) 6

Neugebauer, R. et al., *Major Depressive Disorder in the 6 Months After Miscarriage*, 277(5) JAMA, 383 (1997) 8

Organization of Teratology Information Systems, *Accutane (Isotretinoin) and Pregnancy* (2002) *at* www.otispregnancy.org/pdf/accutane.pdf 7

Peppers, L. G. & Knapp, R. J., *Maternal Reactions to Involuntary Fetal/Infant Death*, 43 Psychiatry 155 (May 1980) 8

Physician's Desk Reference (57th ed. 2003) 7

Rafsoon, E., *What Price Beauty*, Boston Globe, April 27, 2003 7

Rand, C.S.W. et al., *Parental Behavior After Perinatal Death: Twelve Years of Observations*, 19 J. Psychosomatic Obstetrics & Gynecology 44 (1998) 10

SHARE Pregnancy & Loss Support, Inc., *Report on Stillbirth Workshop at the National Institute of Health* (April 2001) *at* http://nationalshareoffice.com/SBWkspReport.asp ... 5, 6

Sims, M.A. & Collins, K.A., *Fetal Death: A 10 Year Retrospective Study*, 22 Am. J. Forensic Med. & Pathology 261 (2001) 5, 14

South Carolina Department of Alcohol and Other Drug Abuse Services ("DAODAS"), *Prevention, Intervention & Treatment: Treatment Services, at* http://www.daodas.state.sc.us/web/treatment.html 17

United States General Accounting Office, *ADMS Block Grant: Women's Set Aside Does Not Assure Drug Treatment for Pregnant Women* (1991). 19

Williams Obstetrics, (F. Cunningham et al. eds., 21st ed. 2001)..... 5, 6

Wisborg, K. et al., *Exposure to Tobacco Smoke in Utero and the Risk of Stillbirth and Death in the First Year of Life*, 154 Am. J. Epidemiology 322 (2001) 6

Woods, J. R., *Pregnancy Loss: Medical Therapeutics and Practical Considerations* (J. Esposito ed., Williams & Wilkins 1987)..... 9, 10

INTERESTS OF *AMICI CURIAE*[*]

Amici include national and South Carolina associations of physicians, nurses, counselors, social workers, and public health practitioners, as well as organizations with specific expertise in addressing stillbirths and pregnancy loss.[1] *Amici* consist of experts in the fields of maternal and neonatal health and share a collective interest in providing appropriate and effective care to women who suffer from the tragedy of stillbirth. Through this brief, *amici* seek to expose the substantial health risks that will likely result when courts depart from science, medical knowledge and established legal precedent in prosecuting, convicting and imprisoning women who have suffered a stillbirth for the crime of homicide by child abuse. Because of the intolerable risks to the well-being of both women and children unleashed by the South Carolina Supreme Court's decision in *State v. Regina D. McKnight*, 576 S.E. 2d 168 (2002), *amici* urge this Court to grant *certiorari* in order to undo the damage of this decision to medical practice and public health.

INTRODUCTION

A deeply splintered South Carolina Supreme Court undertook a dangerous and unprecedented departure from law, science and established medical practice when upholding the homicide conviction of Regina McKnight. The prosecution, conviction, and sentencing of Ms. McKnight for her stillbirth not only distorts the law, but contradicts the clear weight of available medical evidence, violates fundamental notions of public health, and undermines the physician-patient relationship. The *McKnight* decision creates two groups of women who suffer the misfortune of pregnancy loss: those who are alleged to have engaged in

---

[*] Both parties consent to the filing of this brief. No entity or counsel apart from those whose names appear on this Brief have contributed monetarily or substantively to its production. Sup. Ct. R. 37.6

[1] Descriptions of the *Amici* are set forth in the Appendix to this brief.

activities or have exposed themselves to situations that, according to "public knowledge", can cause fetal demise, and those women about whom no such allegation is made. By sanctioning this differentiation – heretofore unrecognized by law – and locating it in the State's criminal codes, the South Carolina Supreme Court's decision will undermine the provision of health care services in such a way that threatens the health and well-being of every mother, fetus and newborn child.

Tens of thousands of women suffer from stillbirths each year. In a substantial number of these cases, medical professionals are unable to provide parents with an explanation (beyond mere conjecture) of how or why the stillbirth occurred. As in the case of Regina McKnight, parents typically experience stillbirths as unexpected and undesired personal tragedies. Yet, by imposing "public knowledge" as a legal standard for determining criminal liability – and by deeming there to be "public knowledge" for a medical claim steadfastly discredited by a clear consensus of scientific researchers and unsupported by the record evidence in this case – the South Carolina Supreme Court in *McKnight* confers boundless discretion on prosecutors to investigate and punish women who suffer pregnancy losses. In so doing, the Court severely compromises accepted protocols of care for women who suffer stillbirths; namely providing medical treatment for the physical trauma accompanying fetal loss, and providing psychosocial support to alleviate often debilitating parental grief and guilt.

The *McKnight* decision, moreover, transforms prenatal and postnatal health care and social services professionals into agents of law enforcement by virtue of their mandatory reporting obligations under state law. As a result, the decision turns a fundamentally medical matter into a criminal justice issue. The likely harms to public health are hard to overstate: the *McKnight* decision makes a potential

prosecutorial target of *all* women in South Carolina who are unfortunate enough to suffer stillbirths.

Amicis' longstanding commitment to the care of pregnant women and their unborn fetuses gives rise to their concerns about the implications of the decision below. *Amici* in no way condone the non-medical use of drugs – including alcohol or tobacco – by either parent during pregnancy. Nor do *amici* contend that there are no health risks associated with illicit drug use during pregnancy. Although the medical literature unequivocally belies South Carolina's assertion that prenatal cocaine exposure caused the stillbirth experienced by Ms. McKnight, it does not indicate that such exposure is benign. Nonetheless, *amici* contend that the factual record and current state of medical science wholly fail to support any claim that Ms. McKnight's stillbirth was caused by the ingestion of cocaine. Instead, the factual record and medical science underscore two points, both of which illuminate the dangers of the *McKnight* precedent. First, medical factors *other than* cocaine are likely to have caused the stillbirth, and second, it is exceedingly difficult to reliably isolate, beyond a reasonable doubt, any one factor (or group of factors) as having caused the stillbirth.

Finally, if let stand, the *McKnight* decision will greatly erode the standard of care for pregnant women and stillbirth mothers. These women (particularly those most at risk for losing their pregnancies) will be deterred from accessing medical care, prenatal treatment and related services for fear of a criminal investigation and possible prosecution if they are unable to deliver a living and full-term child.

REASONS FOR GRANTING THE PETITION

I. Review Should Be Granted Because The McKnight Decision Threatens The Health of All Child-Bearing Women in South Carolina.

In *State v. McKnight*, a sharply divided South Carolina Supreme Court sanctioned the prosecution of women for homicide by child abuse when they suffer stillbirths after engaging in activities that are "well documented and **within the realm of public knowledge** . . . [to potentially] cause serious harm to the viable unborn child." 352 S.C. 635, 645, S.E. 2d 168, 173 (2003) (emphasis added). Notwithstanding the facts of the case, the South Carolina Supreme Court's holding in *McKnight* is in no way limited to the ingestion of illicit substances during pregnancy. The *McKnight* decision instead creates an untenable standard for punishing women who engage in *any* conduct, or who suffer from any number of "preventable" medical conditions that are commonly believed – whether accurately or not – to be harmful to a fetus. The sweeping breadth of liability is confirmed by South Carolina's law enforcement personnel[2] and threatens to turn many, if not most stillbirth mothers in South Carolina into potential targets for criminal investigation. This expansion of potential criminal liability, in turn, will almost certainly undermine the ability of health professionals to deliver appropriate care to women who suffer pregnancy loss.

A. Given the Numerous Acts, Omissions and Conditions that Can Precipitate Stillbirth, The McKnight Decision Casts A Wide Net of Potential Criminal Liability For Pregnant Women.

About 28,000 American women suffer from stillbirths each year,[3] an estimated 500 of whom are from South

---

[2] In comments to the media, Horry County Chief Prosecutor Greg Hembree declared his intent to use the *McKnight* decision to prosecute women "[e]ven if a legal substance is used, if we determine [they] are *medically responsible* for a child's demise." [emphasis added]. E. Gaston, *Conway Homicide Case Sets Precedent*, The Sun News (Myrtle Beach, SC) May 19, 2001, at A1.

[3] *See* Nat'l Ctr. for Health Statistics, Ctr. for Disease Control, *Births:*

Carolina.[4] As many as 20 to 30 percent of all pregnancies end in miscarriage or stillbirth.[5] A wide range of medical conditions, actions, omissions, and environmental factors are known to contribute to fetal death. Nevertheless, a small but significant number of pregnancies progress without apparent complication until something simply goes awry, resulting in unexplained pregnancy loss. These tragic and inexplicable outcomes account for approximately ten percent of all stillbirths.[6]

Fetal abnormalities account for 25 to 40 percent of fetal demise,[7] and include birth defects, chromosomal

---

Final Data for 2000, 50(5) National Vital Statistics Report 27 (2002) *at* http://www.cdc.gov/nchs/data/nvsr/nvsr50/50_05_01.pdf (stating number of births each year); Nat'l Ctr. for Health Statistics, Ctr. for Disease Control, *Table 23: Infant Mortality Rates, in Health, United States, 2002*, at 109 (2002) *available at* http://www.cdc.gov/nchs/data/hus/tables/2002/02hus023.pdf (stating annual rates of fetal death).

[4] *See e.g.*, Div. of Biostatics, S.C. Dept. of Health & Envtl. Control, *Table 52: Fetal Mortality and Fetal Mortality Rate by Race of Mother*, [1998] 1 Annual Vital Statistics Series 107.

[5] C. Malacrida, *Complicating Mourning: The Social Economy of Perinatal Death*, 9(4) Qualitative Health Research 504, 505 (July 1999). Pregnancy loss falls into two categories: miscarriage and stillbirth. Miscarriage describes pregnancy loss within the first 20 weeks of pregnancy and stillbirth generally refers to pregnancy loss that occurs after 20 weeks. L. Friedman, *A Woman Doctor's Guide to Miscarriage*, at xi-xii (Laurie Abkemeier ed., Hyperion 1996).

[6] *Williams Obstetrics* 1075 (F. Cunningham et al. eds., 21st ed. 2001). *See also*, M.A. Sims & K.A. Collins, *Fetal Death: A 10-Year Retrospective Study*, 22 Am. J. Forensic Med. & Pathology 261 (2001) ("Despite efforts to identify the etiological factors contributing to fetal death, a substantial portion of fetal deaths are still classified as unexplained intrauterine fetal demise."); SHARE Pregnancy & Loss Support, Inc., *Report on Stillbirth Workshop at the National Institute of Health* (April 2001) *at* http://nationalshareoffice.com/SBWkspReport.asp (noting that the cause for up to 50 percent of stillbirths may not be determinable).

[7] *Williams Obstetrics*, *supra*, at 1074 (referring to Cunningham and Hollier (1997)).

abnormalities, and various fetal infections (bacterial, viral and other).[8] Chromosomal abnormalities are discovered in as many as eight percent of all stillbirths.[9] Placental defects constitute 25 to 35 percent of fetal demise.[10] Maternal illness accounts for between five and ten percent of fetal demise and encompasses such conditions as trauma, sepsis, hypertensive disorders, syphilis, diabetes, lupus anticoagulant, anticardiolipin antibodies, and hereditary thrombophilia (serious edema of the fetus).[11] Most of these causes can be identified by specific pathological factors.

In addition, a wide range of conduct by pregnant women is commonly believed to cause significant harm to a fetus. Under the *McKnight* standard, each one of these acts (or omissions) is "within the realm of public knowledge" for increasing the risk of stillbirth and is now actionable. For example, a recent study indicates that women who smoke tobacco during pregnancy double their risk of delivering a stillborn child.[12] Many workplace environments are similarly known to present significant risks to fetal health. *See, e.g. Automobile Workers v. Johnson Controls*, 499 U.S. 187 (1991). Other factors also increase the likelihood of pregnancy loss. Becoming pregnant after the age of 35 carries with it a heightened risk, even when controlling for diabetes, hypertension, and other complications associated with increased maternal age.[13] Additionally, women who experience even a single stressful event during pregnancy are more than twice as likely to experience reproductive loss.[14]

---

[8] *Id.*

[9] *Id.* at 1076.

[10] *Williams Obstetrics*, *supra*, at 1074.

[11] *Id.* at 1074-75.

[12] K. Wisborg et al., *Exposure to Tobacco Smoke in Utero and the Risk of Stillbirth and Death in the First Year of Life,* 154 Am. J. Epidemiology 322, (2001).

[13] R. Fretts et al., *Increased Maternal Age and the Risk of Fetal Death*, 333(15) New Eng. J. Med. 953, 956 (1995).

[14] R. Neugebauer et al., *Association of Stressful Life Events With*

It is likewise well publicized through both the media and labeling that many over-the-counter[15] and prescription drugs can cause fetal death or serious fetal harm.[16] One particularly stark example is the use of the popular acne medication Accutane. Pregnant women who take this medication have a 25-35 percent increased chance of delivering a child with multiple major deformities in addition to an increased risk of miscarriage, stillbirth, or infant death[17] Although these risks are listed prominently on Accutane's label and have been reported in the news media,[18] nearly three out of 1,000 women between ages 15 and 44 use Accutane to improve their complexions.[19]

After *McKnight*, any pregnant South Carolinian who smokes cigarettes, is over 35, uses certain over-the-counter or prescription medications, or works in a factory where there is

---

Chromosomally Normal Spontaneous Abortion, 143 Am. J. Epidemiology 588 (1996).

[15] "Large doses of aspirin may result in delayed onset of labor, premature closure of the fetal ductus arteriosus . . . or neonatal bleeding." *The Merck Manual of Diagnosis and Therapy* 1859 (R. Berkow ed., 16th ed. 1992) [hereinafter *Merck Manual*].

[16] Myriad prescription medications are "publicly known" to cause severe birth defects. *See, e.g.*, K.L. Jones, *Smith's Recognizable Patterns of Human Malformation* 495, 504 (J. Fletcher ed., 5th ed. 1997) (**anticonvulsants** and **anticoagulants**); J.G. Bernstein, *Handbook of Drug Therapy in Psychiatry* 415 (2d ed. 1988) (*citing* G.E. Robinson et al., *The Rational Use of Psychotropic Drugs in Pregnancy and Postpartum*, 31 Can. J. Psychiatry 183 (1986) (**lithium and other mood-stabilizers**); *Physician's Desk Reference* 3391 (57th ed. 2003) (**antibacterials**); *Merck Manual*, *supra*, at 1859, 1861 (**thyroid medications** and **antihypertensive drugs**).

[17] Org. of Teratology Information Systems, *Accutane (Isotretinoin) and Pregnancy* (2002) *at* www.otispregnancy.org/pdf/accutane.pdf. Additionally, the risk of miscarriage for women who use accutane is possibly as high as 50%. *Id. See also* M.A. Honein et al., *Continued Occurance of Accutane-Exposed Pregnancies*, 64 Teratology 142 (2001).

[18] *See, e.g.*, E. Rafsoon, *What Price Beauty*, Boston Globe, April 27, 2003, Magazine, at 15 (explaining "why [Accutane] has become the most widely prescribed birth-defect-causing medicine in the United States.").

[19] M.A. Honein et al., *supra*, at 144.

a danger of exposure to hazardous waste, and suffers a miscarriage or stillbirth can face prosecution for homicide. And, as discussed below, not only does *McKnight* cast an impermissibly broad net of potential criminal liability on pregnant women, it saddles their health care providers with a duty of breathtaking scope and uncertain dimensions: to report stillbirths that the provider believes *may* have been caused by these same "publicly known" risks taken on the part of the mother.

B. The *McKnight* Decision Undermines Accepted Standards of Care for Treating Women Who Suffer Stillbirth.

Following stillbirth, parents, and particularly mothers, usually experience intense bereavement and grief.[20] Feelings of depression, guilt, anxiety, isolation, and bitterness are often heightened when fetal loss occurs late in pregnancy.[21] Grief is exacerbated by the physical and emotional strain stemming from birthing a dead child (or one that dies shortly after birth), as well as by the hormonal imbalances of pregnancy. Consequently, parents who suffer fetal loss often grieve with the same intensity as those who lose a close relative,[22] and need to engage in certain rites and rituals.[23]

---

[20] R. Neugebauer et al., *Major Depressive Disorder in the 6 Months After Miscarriage,* 277(5) JAMA, 383, 387 (1997); J. DeFrain et al., *The Psychosocial Effects of Miscarriage: Implications for Health Professionals*, 14(3) Fam. Sys. & Health 331, 335 (1996); L. Hammersley & C. Drinkwater, *The Prevention of Psychological Morbidity Following Perinatal Death*, 47 British Journal of General Practice 583 (September 1997).

[21] H. Janssen et al., *Controlled Prospective Study on the Mental Health of Women Following Pregnancy Loss*, 153 Am. J. Psychiatry 226 (February 1996).

[22] L. G. Peppers & R. J. Knapp, *Maternal Reactions to Involuntary Fetal/Infant Death*, 43 Psychiatry 155 (May 1980) (citing K. Kowalski & W. Bowes, *Parents' Response to a Stillborn Baby*, 8 Contemporary Obstetrics and Gynecology 53-57 (1976); P. Giles *Reactions of Women to Perinatal Death*, 10 Austl. & N. Z. J. Obstetrics & Gynecology 207

In this regard, the record reflects that Ms. McKnight responded to her stillbirth like many women who suffer this misfortune: she asked to and did hold her stillborn baby; she named the baby; she asked that photographs be taken; and she requested to be given a "memory certificate" with the baby's footprints and hospital bracelet. Ms. McKnight also sought solace from the hospital's chaplain.

The *McKnight* decision, however, upends all accepted medical standards for the care of women who suffer stillbirths. As with other momentous medical events, physicians and psychologists have developed treatment protocols to address the psychosocial difficulties that accompany stillbirth. Many women who miscarry or suffer stillbirth experience feelings of self-blame, guilt and/or shame. These emotions are heightened by the increased tendency for self-blame prompted by a growing body of popular literature,[24] warning labels, and general confidence in the advances of modern medicine, which create the false sense that "good mothers" have healthy pregnancies. As a result, women who suffer stillbirths or miscarriages inevitably re-live their entire pregnancy, searching for the event or events – the cup of coffee, the stress at work, or the strenuous exertion at home – to explain their loss and to blame themselves.

Addressing these feelings is critical to recovery and is a core concern of healthcare providers.[25] Recommended

---

(1970)).

[23] L. Layne, *Motherhood Lost: Cultural Dimensions of Miscarriage and Stillbirth in America*, 16(3) Women & Health 69 (1990).

[24] *See, e.g.*, A. Eisenberg et al., *What To Expect When You're Expecting* 54-57 (2d ed. 1996) (popular pregnancy advice book warning women to avoid, *inter alia*, changing a cat litter box, consuming unpasteurized cheese or undercooked meat, gardening without gloves, inhaling when handling household cleaning products, and ingesting caffeine).

[25] *See* J. R. Woods, *Pregnancy Loss: Medical Therapeutics and Practical Considerations* 64-65 (J. Esposito ed., Williams & Wilkins 1987). *See also*, Friedman, *supra*.

protocols involve medical and psychological care to address specific patient needs.[26] Post-partum contact by obstetricians and nurses, for example, is considered to be an essential part of caring for women who have suffered pregnancy loss.[27] One essential goal of treatment providers is to "creat[e] an atmosphere of unconditional acceptance and compassion."[28] Despite enormous achievements in health care and scientific understanding, health care workers addressing pregnancy loss must teach the sad truth that pregnancy outcome is never guaranteed, that pregnancy loss is not always preventable, and that the reasons for poor pregnancy outcomes are often elusive.

By contrast, the *McKnight* decision now requires medical personnel who learn of a stillbirth to make a critical decision as they meet the grieving parents: did the mother engage or not engage in conduct commonly known to affect pregnancy. If they believe that the woman was *not* engaging in such conduct she is offered sympathy, counseling, and professional support. If, by contrast, it is suspected by any law enforcement authority or medical official that the woman might have engaged in conduct that is "publicly known" to endanger fetuses – applying this new and amorphous medico-legal standard – the woman must become the subject of criminal interrogation, testing, and invasive physical examination for the purpose of investigating, prosecuting and incarcerating her for her pregnancy loss.

---

[26] C.R. Geerinck-Vercammen, *With a Positive Feeling: The Grief Process After Stillbirth in Relation to the Role of Professional Caregivers,* 87 Eur. J. Obstetrics & Gynecology and Reproductive Biology 119 (1999) (research in progress). *See also,* C.S.W. Rand et al., *Parental Behavior After Perinatal Death: Twelve Years of Observations*, 19 J. Psychosomatic Obstetrics & Gynecology 44 (1998) (discussing importance of being flexible in responding to parents' wishes about how to mourn and grieve).

[30] J. R. Woods, *supra*, at 111-131.

[28] K. Kluger-Bell, *Unspeakable Losses* 146 (New York, WW Norton & Co. 1998).

It is difficult to overstate the degree to which the *McKnight* decision distorts the provision of maternal health care. The decision shifts pregnancy loss from a medical and public health matter (occasioning treatment), to a potential criminal act (requiring forensic investigation and state sanctioned punishment). As a likely consequence of *McKnight*, therapy and support for many women who suffer stillbirths will be compromised and curtailed, if not withdrawn altogether, in the wake of law enforcement needs. Instead of receiving sympathy for the trauma they have experienced, stillbirth mothers will be met with suspicion by the health and social services professionals with whom they interact. As explained further below, this dramatic shift portends potentially devastating health consequences.

II. Review Should Be Granted Because There is No Reliable Medical Evidence That Ms. McKnight's Cocaine Use Caused Her Stillbirth.

A. The Record Fails to Support South Carolina's Claim that Cocaine Caused McKnight's Stillbirth.

The protocol for accurately determining the cause of fetal demise must take into account the many possible factors that might be responsible for the stillbirth. Isolating and identifying the potential causes of fetal demise can be quite difficult and is often unsuccessful. Such determinations require an interdisciplinary team of obstetricians, neonatologists, pathologists, and geneticists, employing an array of scientific procedures. The investigative process is typically one of exclusion; however, investigators are often left not with a single, clear explanation for fetal demise, but rather a series of clues and various alternative, possible causes. As observed by the Guidelines established by the College of American Pathologists, "although many conditions can be ruled out, it may be impossible to determine the actual cause of death in a fairly large number

of cases."[29] In fact, approximately ten percent of all fetal deaths remain *entirely* unexplained.[30]

Fetal autopsies are commonly performed. Such autopsies usually consist of both gross and microscopic evaluation of the stillborn fetus, the cord, membranes and placenta.[31] Measurements of crown-rump length, foot length and body weight,[32] and skeletal radiographs or xeroradiography also serve as diagnostic tools.[33] Specialists perform laboratory and diagnostic examinations of the mother to determine the existence of infections or maternal conditions that could have resulted in the stillbirth; review obstetric and family histories; and investigate pertinent information in the maternal and paternal pedigrees.[34]

These procedures were *not* followed in Ms. McKnight's case, where the overwhelming weight of the scientific evidence not only does *not* support the conclusion that cocaine caused Ms. McKnight's stillbirth, but affirmatively points to other non-cocaine-related explanations. Research published at the time of Ms. McKnight's trial indicated that only two complications could potentially be associated with prenatal cocaine exposure and stillbirths: placental abruption and premature rupture of the membrane.[35] Neither condition

---

[29] K.E. Bove & The Autopsy Comm. of the Coll. of Am. Pathologists, *Practice Guidelines for Autopsy Pathology*, 121 Archives Pathology & Laboratory Med. 368, 373 (1997).

[30] *See supra* note 6.

[31] Am. Acad. of Pediatrics & Am. Coll. of Obstetricians and Gynecologists, *Guidelines for Perinatal Care* 202 (4th ed. 1997).

[32] Bove et. al., *supra*, at 373.

[33] C. Curry & L.H. Honoré, *A Protocol for the Investigation of Pregnancy Loss*, 17 Clinics in Perinatology 723, 726 (1990).

[34] *Guidelines for Perinatal Care*, *supra*, at 202.

[35] A. Addis et al., *Fetal Effects of Cocaine: An Updated Meta-Analysis*, 15 Reprod. Toxicology 341, at 348-49, 354 (2001). *See also* N. Bingol et al., *Teratogenicity of Cocaine in Humans*, 110 J. Pediatrics 93, 94 (1987) (finding abruption placentae present in all stillbirths suffered by group of cocaine using women).

was present in this case. The fetal autopsy report fails to mention placental abruption, and neither of the State's pathologists testified that Ms. McKnight experienced this condition. Similarly, the State's pathologists, Ms. McKnight's medical records, and the autopsy report indicate no premature rupture of membranes. Furthermore, other fetal conditions that some researchers have found to be associated with *in utero* cocaine exposure, *e.g.*, reduced birth weight and congenital defects[36] (conditions that research has been unable to isolate from factors such as maternal exposure to alcohol, tobacco, or poverty) were also absent in this case.[37]

In light of the absence of any recognized indicia for cocaine-associated fetal demise, the State's claim that cocaine use *caused* Ms. McKnight's stillbirth must derive from a "presumptive diagnosis," or the elimination of alternative causes. The factual record in this case, however, undercuts this analysis. In particular, the autopsy report identifies chorioamnionitis (inflammation of the fetal membranes) and funisitis (inflammation of the umbilical cord) as two additional causes of fetal death. Ms. McKnight also was diagnosed with syphilis, suffered from hypothyroidism, was homeless, and (like many South Carolinians) smoked tobacco. Any one of these factors increases the risk of pregnancy loss; in combination, the risk is magnified.

Even though the full weight of medical evidence in this case points to a cause or causes for fetal demise *other than* cocaine exposure, the trial record shows that the State apparently halted its investigative inquiries after obtaining positive tests for cocaine metabolites. Because the State did

---

[36] Bingol et al., *supra*, at 94. *But see* D. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613 (2001).

[37] The State's pathologists testified that the organs of McKnight's fetus were normal, R. 176-77, 328:17-18, 340:14-15, and that it appeared to have developed without incident prior to the stillbirth, R. 325:9-10.

not consider, let alone rule out the other, proven risk factors for fetal demise present in Ms. McKnight's medical and social history, the most that can be said, on the basis of the State's investigation, is that there is *no* identifiable cause of the stillbirth.

The fact that a positive toxicology for cocaine coincides with a stillbirth simply does not establish causation, for medical or legal purposes. South Carolina's failure to adequately investigate the cause of Ms. McKnight's stillbirth – and the inaccuracy of its unsupported claim that cocaine was the cause – is underscored by two studies from the Medical University of South Carolina ("MUSC"). These studies highlight the difficulty in determining the cause of stillbirths, not to mention the near impossibility of concluding that cocaine can be its sole cause. In a ten-year retrospective (Jan. 1989 – December 1998) of pediatric toxicological deaths, not a single neonatal or fetal death was attributed to cocaine use, even in those cases where cocaine metabolites were present.[38] A second study focused on the 42 fetal deaths referred for autopsy to the Forensic Section of MUSC between 1990 and 1999.[39] In a full 29 percent of the fetal deaths examined, the cause of death could not be determined.[40] As with the previous study, all of the cocaine associated deaths were designated as "natural" or "undetermined," – *not* as homicides (as was done in Ms. McKnight's case). In short, in a large number of fetal deaths, forensic pathologists at MUSC were unable to establish causation, and even where cocaine was present, it was not listed as a primary cause of death. Against this backdrop, the State's assertion that cocaine caused Ms. McKnight's stillbirth appears to derive not from medical fact and

---

[38] *See* T.A. Campbell & K.A. Collins, *Pediatric Toxicologic Deaths: A 10 Year Retrospective Study*, 22 Am. J. Forensic Med. & Pathology 184 (2001).

[39] *See* Sims, *supra*.

[40] *Id.* at 263.

scientific method, but rather prosecutorial overreaching.

B. There Can Be No "Public Knowledge" of the Effects of Prenatal Cocaine Ingestion When Medical and Scientific Research is Inconclusive On This Point.

In finding Ms. McKnight criminally culpable in the homicide of her fetus, the *McKnight* majority reasons that it is appropriate to expect adult women to be aware of the dangers to fetal health that can result from ingesting cocaine during pregnancy.[41] That Court's expectation in this regard is unfounded. Indeed, the scientific community that specializes in researching the teratogenic effects of cocaine is itself currently unable to reach consensus about the nature of the harms posed by prenatal cocaine exposure or the likelihood those harms will materialize when cocaine is ingested during pregnancy. Nevertheless, according to the South Carolina Supreme Court, the general public is expected to know that which the world's most credentialed experts are unwilling to pronounce: that maternal cocaine use by itself poses unique and heightened dangers of fetal death.

Contemporary research on the developmental impact of cocaine use during pregnancy has debunked the myth that mere exposure to cocaine causes certain fetal harms. In advance of Ms. McKnight's trial the Journal of the American Medical Association ("JAMA"), published a comprehensive and authoritative analysis of medical research assessing the relationship between maternal cocaine use during pregnancy and adverse developmental consequences for the fetus and child.[42] JAMA researchers identified all seventy-four English-language studies of the effects of *in utero* cocaine

---

[41] Writing for the majority in *McKnight*, Justice Waller states "Given the fact that it is public knowledge that usage of cocaine is potentially fatal, we find the fact that McKnight took cocaine knowing she was pregnant was sufficient evidence to submit to the jury on whether she acted with extreme indifference to her child's life." *McKnight*, 352 S.C. at 646.

[42] *See* Frank, *supra*.

exposure[43] and then reviewed those which complied with accepted scientific practices. The researchers concluded that "there is no convincing evidence that prenatal cocaine exposure is associated with any developmental toxicity different in severity, scope, or kind from the sequelae of many other risk factors."[44] In light of these findings, the JAMA researchers condemn as "irrational[]" policies that selectively "demonize" *in utero* cocaine exposure or target pregnant cocaine users for special criminal sanction.[45] Similarly, there are no methodologically sound studies that prove prenatal cocaine exposure significantly increases the risk of stillbirth.

None of this is to say that prenatal cocaine exposure is benign. While current studies are unable to link cocaine use to adverse fetal developments, neither do they exclude cocaine as a potential fetotoxin.[46] Without doubt, more research is needed. But it is precisely this fact that exposes the injustice and irrationality of the *McKnight* decision. Where science has yet to speak with causal assurance, the Court below found sufficient *mens rea* to convict Ms. McKnight of homicide. Whether one looks to the evidence in the record that fails to support an inference of cocaine-induced death (and affirmatively points to other likely causes) or one consults the scientific literature, the South Carolina Supreme Court's ruling is simply untenable.

III. Review Should Be Granted Because the McKnight Decision Will Deter Women From Obtaining Adequate Prenatal Health Care.

Amici are firmly convinced that the *McKnight* decision will undermine the quality and accessibility of health care for

---

[43] *Id.* at 1614.
[44] *Id.* at 1621, 1624.
[45] *Id.* at 1621.
[46] *See, e.g.*, I. Morild & M. Stajc, *Cocaine and Fetal Death*, 47 Forensic Sci. Int'l 181 (1990).

many women who are pregnant or recovering from delivery, miscarriage or stillbirth.[47] Trust and confidence have long defined the relationship between a patient and her caregiver. By sanctioning law enforcement's intrusion into the sphere of prenatal care and post-stillbirth treatment, however, the McKnight decision guts the traditional expectations of patient candor and medical confidentiality. In so doing, the decision endangers the future health and well-being of women and their fetuses, particularly mothers who suffer from drug dependency.[48]

Many medical conditions or forms of conduct that can affect the course of pregnancy for the mother and/or fetus, including drug use, are not readily apparent to treatment providers.[49] Thus, the ability to provide appropriate and timely medical care rests, in large part, on the ability of treatment providers to elicit from patients medical and social information that will inform the diagnosis and proper course of treatment to promote maternal and fetal health.

---

[47] South Carolina ranks last among the states in spending on programs that address the effects of alcohol and drug abuse. *See* K. Baca, *South Carolina Spends the Least on Substance Abuse Prevention*, Associated Press State and Local Wire, Jan 29, 2001 (noting that in 2000, the state was only "able to treat about 52,000 of the 310,000 South Carolinians identified as having a substance abuse problem.") (citing Nat'l Ctr. on Addiction and Substance Abuse, *Shoveling Up: The Impact of Substance Abuse on State Budgets*, *available at* http://www.casacolumbia.org/usr_doc/47299a.pdf).

[48] South Carolina's Department of Alcohol and Other Drug Abuse Services forthrightly acknowledges that "[u]nfortunately . . . there are women who do not seek treatment, primarily out of fear; fear of what others might say; fear of prosecution; fear of losing their children; fear of losing their jobs; and fear of losing the support of their families." South Carolina Dept. of Alcohol and Other Drug Abuse Services ("DAODAS"), *Prevention, Intervention & Treatment: Treatment Services, at* http://www.daodas.state.sc.us/web/treatment.html, (last visited July 23, 2003).

[49] I. Chasnoff, *Drug Use in Pregnancy: Parameters of Risk*, 35 Pediatric Clinics N. Am. 1403, 1410 (1988).

The sanctity of the health care provider-patient relationship is particularly critical where the treatment of pregnant drug using women is involved, because "[t]he promise of confidentiality encourages patients to disclose sensitive subjects to a physician without fear that an embarrassing condition will be revealed to unauthorized people."[50] A strong health provider-patient relationship promotes the integration of substance abuse treatment with primary or prenatal care resulting in healthier babies.[51] In recognition of this medical reality courts have long viewed the obligation of confidentiality as not solely a matter of principle, but a necessary precondition of the patient-care provider relationship.[52]

McKnight, however, eviscerates fundamental tenets of medical confidentiality. Any pregnant South Carolinian who now confides in her health care provider that she has engaged in any activity that is "publicly known" to cause harm to her fetus, places herself at risk of becoming the target of criminal investigation for homicide if she later suffers a stillbirth.[53]

---

[50] R. Arnold et al., *Medical Ethics and Doctor/Patient Communication, in The Medical Interview: Clinical Care, Education and Research* 365 (M. Lipkin, Jr. et al. eds., 1995) (citing W. Winslade, *Confidentiality, in Encyclopedia of Bioethics* (W. T. Reich ed.)). *See also*, S. H. Ebrahim & J. Gfroerer, *Pregnancy-Related Substances Use in the United States During 1996-1998*, 101(2) Obstetrics and Gynecology 374 (February 2003) ("Pregnancy-or childbirth-related contact of women with the health care system gives health care providers a unique opportunity to access women who use substances and possibly their partners to facilitate substance abuse treatment, the benefits of which extend to their infants and future pregnancies.").

[51] M.A. Armstrong, et al., *Perinatal Substance Abuse Intervention in Obstetric Clinics Decreases Adverse Neonatal Outcomes*, 23 J. Perinatology 3 (2003).

[52] *See Jaffee v. Redmond*, 518 U.S. 1, 10 (1997) ("the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment").

[53] It appears likely that the *McKnight* decision may well open the floodgates to a rash of like prosecutions. In May, 2003, South Carolina

Clinicians and researchers warn that the mere suggestion that obtaining health care could lead to criminal sanctions will deter many pregnant women from seeking critical prenatal care. As the Board of Trustees of the American Medical Association states: where such danger of criminal sanctions exists, "[p]regnant women will be likely to avoid seeking prenatal or other medical care for fear that their physicians' knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment."[54] The threat that a stillbirth could result in a *homicide* conviction (and a lengthy sentence) simply exacerbates such fears and will hinder access to vital medical care and substance abuse services for South Carolinian women. Virtually every other major public health and medical organization to address this issue has also inveighed against the path taken by the *McKnight* majority and has warned about the harmful consequences that will result.[55]

---

prosecutors decided to charge Angela Shannette Kennedy with homicide for a stillbirth that she experienced on December 11, 1998. *See* T. Langhorne, *Solicitor: Woman's Cocaine Use Killed Fetus*, Spartanburg Herald Journal, May 3, 2003.

[54] Am. Med. Ass'n, *Legal Intervention During Pregnancy*, 264 JAMA 2663, 2667 (1990). *See also id.* at 2670 (reporting AMA resolution that "[c]riminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate").

[55] This Court recently recognized that there is "a near consensus in the medical community that programs of the sort at issue, by discouraging women who use drugs from seeking prenatal care, harm, rather than advance, the cause of prenatal health." *Ferguson v. City of Charleston, South Carolina*, 532 U.S. 67 at 83, n.23 (2001). *See also* Bd. of Directors, Am. Soc'y of Addiction Med., *Public Policy Statement on Chemically Dependent Women and Pregnancy* (September 25, 1989); Comm. on Substance Abuse, Am. Acad. of Pediatrics, *Drug-Exposed Infants*, 86 Pediatrics 639, 642 (1990); March of Dimes, *Statement on Maternal Drug Abuse* 1 (December 1990); Nat'l Ass'n of Pub. Child Welfare Administrators, *Guiding Principles for Working with Substance-Abusing Families and Drug-Exposed Children: The Child Welfare Response* (January 1991); Am. Psychiatric Ass'n, *Care of Pregnant and*

The criminal investigation and possible prosecution of women like Ms. McKnight sends a perilous message to pregnant addicts *not* to seek prenatal care or drug treatment, *not* to confide their addiction to health care professionals, and *not* to give birth in hospitals – or not to carry the fetus to term. Accordingly, such prosecutions fail to serve any legitimate purpose, and in fact undermine South Carolina's objectives of promoting maternal and fetal health. Instead of saving lives, the McKnight decision prosecution is likely to endanger them.

CONCLUSION

Because the prosecution and conviction of Regina McKnight for homicide by child abuse is not supported as a matter of science, inappropriate as a matter of public health, and unfounded as a matter of law *amici curiae* respectfully request this Honorable Court to grant the petition for *certiorari*.

Respectfully submitted,

JUDITH K. APPEL
DANIEL N. ABRAHAMSON
Counsel of Record
Drug Policy Alliance
717 Washington Street
Oakland, CA 94607
(510) 208-7711

Attorneys for *Amici Curiae*

Newly Delivered Women Addicts: Position Statement (March 2001); Nat'l Council on Alcoholism and Drug Dependence, *Women, Alcohol, Other Drugs and Pregnancy* (1990); and Am. Nurses Ass'n, *Position Statement* (April 5, 1992).

APPENDIX

DESCRIPTIONS OF *AMICI CURIAE*

Amicus Curiae American Public Health Association ("APHA") is a national organization devoted to promoting and protecting personal and environmental health. Founded in 1872, APHA is the largest public health organization in the world, representing over 50,000 public health professionals. APHA also represents all disciplines and specialties in public health, including maternal and child health and substance abuse. APHA strives to improve public health for everyone by proposing solutions based on research, setting public health practice standards, and working closely with national and international health agencies.

Amicus Curiae American Nurses Association ("ANA") is a professional organization representing over 2.2 million registered nurses. ANA is committed to ensuring the availability and accessibility of health care services. It believes that access to maternal and child health services is critical to preventing disease and promoting the well-being of parents and children. Accordingly, ANA opposes laws, policies and practices, like the prosecution of Ms. McKnight, that unnecessarily erect barriers to prenatal care and related health services.

Amicus Curiae The American Psychiatric Association ("APA"), with roughly 40,000 members, is the nation's leading organization of physicians specializing in psychiatry, a field regularly concerned with substance abuse and dependence. The APA opposes criminal prosecutions based on use of substances during pregnancy. By deterring prenatal care and addiction treatment, such prosecutions impairs the health and safety interests that are the central concern of the APA's members.

Amicus Curiae National Stillbirth Society is an organization devoted to advocating on behalf of the more than 26,000 American mothers who suffer a stillbirth each year. As a misunderstood, under-discussed and under-researched medial condition, its mission is to promote greater stillbirth awareness, research and reform. The National Stillbirth Society supports this brief because it believes that contrary to popular theories, stillbirth is a random event that strikes all categories of mothers and is generally never caused by something the mother did or did not do. Although the National Stillbirth Society does not condone illicit drug use by any person at any time, it believes that the circumstances of Ms. McKnight's situation does not suggest a crime, but that her baby was one of the 15,000 stillbirths each year for which no cause can be attributed.

Amicus Curiae National Association of Social Workers, Inc. ("NASW") is the world's largest association of professional social workers with over 155,000 members in fifty-five chapters throughout the United States and abroad. Founded in 1955, NASW is devoted to promoting the quality and effectiveness of social work practice, advancing the knowledge base of the social work profession, and improving the quality of life through social work expertise.

Amicus Curiae South Carolina Medical Association ("SCMA") is the primary professional association for individuals licensed to practice medicine in South Carolina. The SCMA has over 5,500 members representing all medical specialties that provide medical services to the citizens of the state. The SCMA's primary mission is to foster high ethical and clinical standards for the practice of medicine in South Carolina.

Amicus Curiae American Society of Addiction Medicine ("ASAM") is devoted to increasing access to and

improving the quality of addiction treatment. ASAM members are physicians from all medical specialties and sub-specialties. They are engaged in private practice, serve as corporate medical directors, work in group practice or other clinical settings, and are also involved in research and education. Through its conferences, continuing medical education courses, and publications (including the textbook, *Principles of Addiction Medicine (Third Edition, 2002))*, ASAM actively educates the medical community and the public about addiction disorders and diseases, treatment guidelines, and practice parameters in the field of addiction medicine. ASAM staunchly opposes policies that create obstacles to or deter persons from receiving substance abuse treatment and counseling.

Amicus Curiae National Association of Nurse Practitioners in Women's Health ("NPWH"), formerly National Association of Nurse Practitioners in Reproductive Health, is a professional organization founded in 1980 that represents nurse practitioners who provide care to women in both the primary care setting and in women's health specialty practices. The U.S. Department of Education recognizes NPWH as the designated organization for the accreditation of women's health nurse practitioner programs. NPWH is committed to assuring access of quality health care to women of all ages by nurse practitioners, and to protecting a woman's right to determine the course of her own health care. NPWH programs and publications offer special expertise in reproductive health care and nurse practitioner issues.

Amicus Curiae Midwives Alliance of North America ("MANA") is an organization of North American midwives and their advocates. MANA's mission is to provide a nurturing and cooperative forum among midwives by promoting communication between midwives and other

health care professionals, creating guidelines for the education of midwives, supporting research that advocates midwifery as a quality health care option, and educating the public on midwifery as a medical practice.

Amicus Curiae South Carolina Primary Health Care Association ("SCPHCA") was incorporated in 1979 to provide health care services to medically underserved areas of South Carolina. As an advocate for those who do not have access to basic health services, SCPHCA's mission is to ensure the continued growth of community based programs and centers that provide primary care for persons most in need. SCPHCA- affiliated centers for community health, mental hygiene, migrant health, and care for the homeless are an integral part of the state's overall health care system and provide services to more than 200,000 patients each year. In many communities in South Carolina, these centers are the only available health care providers. SCPHCA membership offers opportunities to network with other persons, agencies, governmental officials, and health centers in developing strategies, policies, and programs that lead to the effective delivery of primary health care.

Amicus Curiae Physician Leadership on National Drug Policy ("PLNDP") is a group of distinguished physicians from a variety of medical specialties. PLNDP's members find common ground in their belief that it is time for a new emphasis in our national drug policy by substantially refocusing our investment into the prevention and treatment of harmful drug use. PLNDP members further believe that criminal sanctions should not interfere with those who have addictive disease in accessing medical services and addiction treatment.

Amicus Curiae NAADAC-The Association for Addiction Professionals ("NAADAC") is the nation's largest

organization of alcohol and drug counselors, with over 14,000 members. NAADAC's members have special expertise in the substance abuse treatment needs of pregnant women. NAADAC joins this brief because it is deeply concerned that the decision below, if permitted to stand, will undermine the quality of care that South Carolina substance abuse professionals can provide pregnant patients, and will deter these women from seeking these essential services.

Amicus Curiae Association of Maternal and Child Health Programs ("AMCHP") is a nonprofit organization that promotes national and state programs and policies on behalf of maternal and child health. AMCHP provides expert technical assistance on reproductive health, adolescent and school health, teen pregnancy prevention, HIV, tobacco control and smoking cessation, immunization, children with special health care needs, perinatal and women's health, data and assessment, service delivery, and other health related issues. AMCHP also represents state public health leaders and others working to improve female reproductive health, adolescents, and their families.

Amicus Curiae Black Women's Health Imperative, formerly the National Black Women's Health Project, is a leading African American health education, research, advocacy and leadership development institution. Founded in 1983, it promotes the empowerment of African American women as educated health care consumers and is a strong voice for the improved health status of African American women. Black Women's Health Imperative is the only national organization devoted solely to the health of the nation's 19 million Black women and girls. The organization's aim is to be the nexus for trusted health information for Black women, as well as the focal point on Black women's health issues for women's organizations, health care providers, researchers, policy makers, the media,

health industries and everyone committed to closing the health gaps that exist for Black women in America.

Amicus Curiae Association of Reproductive Health Professionals ("ARHP") is a national non-profit, medical association for leaders in the field of reproductive health. Founded in 1963, ARHP is comprised of physicians, nurse practitioners, clinicians, pharmacists, and researchers who serve as important resources for health care professionals, patients, legislators, other professionals, and the public at large. ARHP believes that the prosecution of Regina McKnight undermines the quality of health care provided to pregnant and parenting women in South Carolina by threatening punishment -- rather than providing treatment -- for the medical issue of substance use during pregnancy.

Amicus Curiae National Council on Alcoholism and Drug Dependence ("NCADD"), with its nationwide network of affiliates, provides education, information, and hope in the fight against the chronic diseases of alcoholism and other drug addictions. Founded in 1944, NCADD has historically offered confidential assessment and referral services for alcoholics and other drug addicts seeking treatment. NCADD opposes the prosecution of Regina McKnight because of the chilling effect it will have on pregnant women who are drug dependent, which makes them less likely to receive treatment. In 1990, the NCADD Board of Directors adopted a policy statement on "Women, Alcohol, Other Drugs and Pregnancy," recommending that "[s]tates should avoid measures which would define alcohol and other drug use during pregnancy as prenatal child abuse and should avoid prosecutions, jailing or other punitive measures which would serve to discourage women from seeking health care services."

Amicus Curiae South Carolina Nurses Association ("SCNA") is a professional organization that represents registered nurses in South Carolina. SCNA strongly supports health care for a number of vulnerable populations, and believes patients must be secure in the knowledge that their treatment providers are wholly devoted to treatment and are not doubling as agents of law enforcement. In 1991, SCNA issued a position statement opposing the criminal prosecution of women for drug use while pregnant. SCNA continues to believe that breaching patient confidentiality and the threat of criminal prosecution deters pregnant women who are drug dependent from seeking and obtaining prenatal care.

Amicus Curiae South Carolina Association of Alcoholism and Drug Abuse Counselors ("SCAADAC") is the association of alcohol and drug abuse counselors employed throughout South Carolina in both the public and private sectors. Founded in 1988, SCAADAC currently has over 500 members. SCAADAC is concerned with the welfare of persons who are chemically dependent and provides public education on addictive illnesses as well as the treatment and prevention thereof. SCAADAC members have reason to believe that pregnant women who require alcohol and/or drug treatment are being deterred from seeking treatment for fear of prosecution in the wake of the *Whitner* and *McKnight* decisions by the South Carolina Supreme Court. Since the *Whitner* decision in 1997, at least two treatment programs in the Columbia area of South Carolina that give priority to pregnant women have already experienced precipitous drops in their admissions. In light of these and other observations, SCAADAC is deeply concerned that pregnant women who require alcohol and/or drug treatment are being deterred from seeking treatment for fear of prosecution.

Amicus Curiae Citizens for Midwifery ("CfM") is a national, non-profit, and consumer-based group that promotes maternal and child health through advocating the Midwives Model of Care and seeks to have these practices recognized as an accepted standard of care for childbearing mothers. In focusing on the normalcy of childbirth and the uniqueness of each childbearing woman and family, this model includes monitoring the physical, psychological, and social well-being of childbearing mothers, providing pregnant women with individualized prenatal care and hands-on assistance during labor and delivery, minimizing technological interventions, and identifying women who require obstetrical attention. As an organization, CfM also provides information on midwifery and childbirth issues, encourages and provides guidance for midwifery advocacy, and represents consumer interests regarding midwifery and maternity care.

Amicus Curiae The Hygeia Foundation, Inc is a non-profit organization focused on reducing healthcare disparities through providing access to its internet-based resources on pregnancy loss and maternal and child health. By maintaining a growing database of over 23,000 registered members, The Hygeia Foundation fosters a global community of education, solace, and communication for all individuals who need this information and support. The Hygeia Foundation believes that this case represents a serious threat to its, and similarly situated organizations', efforts to address the impact and trauma of pregnancy loss on parents, their families and their medical providers.

Amicus Curiae Institute for Health and Recovery ("IHR") is a non-profit organization dedicated to developing a comprehensive continuum of care for families affected by substance abuse, with a particular emphasis on women and their children. IHR focuses on prevention, intervention,

treatment, and the integration of gender-specific services within substance abuse prevention and treatment. With over 10 years of experience in working with pregnant women who use drugs, IHR members have firsthand experience with the fears pregnant substance abusing women have regarding prosecution, causing them to be reluctant in seeking prenatal care and substance abuse treatment.

Amicus Curiae American Academy of Addiction Psychiatry ("AAAP") is an international professional membership organization made up of practicing psychiatrists, university faculty, medical students and other related professionals. Founded in 1985, it currently represents approximately 1,000 members in the United States and around the world. AAAP is devoted to promoting access to the highest quality treatment for all who need it by providing continuing education for addiction professionals, disseminating new information in the field of addiction psychiatry, and encouraging research on the etiology, prevention, identification, and treatment of addictions. AAAP opposes the prosecution of Regina McKnight based on the belief that the disclosure of a pregnant woman's drug use to law enforcement for use in criminal prosecutions will undermine prenatal care, discourage many women from seeking substance abuse treatment, and damage the medical provider-patient relationship that is founded on principles of confidentiality.

Amicus Curiae Global Lawyers and Physicians ("GLP") is a non-profit non-governmental organization that focuses on health issues and human rights. Founded in 1996, GLP was formed to reinvigorate the collaboration of the legal, medical and public health professions in protecting the human rights and dignity of all persons. GLP's mission is to implement the health-related provisions of the Universal Declaration of Human Rights and the Covenants on Civil and

Political Rights and Economic, Social, and Cultural Rights, with a focus on health and human rights, patient rights, and human experimentation.

Amicus Curiae Physicians for Reproductive Choice and Health ("PRCH") is a national, non-profit organization committed to ensuring that all people have the knowledge, access to quality services, and freedom to make their own reproductive health decisions. PRCH is also committed to educating physicians about reproductive health issues. Founded in 1992, PRCH is comprised of over 2,800 physicians from various medical specialties while also representing over 2,200 supporting members. PRCH believes that doctors should honor and protect their commitment to the integrity and confidentiality of the doctor-patient relationship, and opposes policies and practices that weaken the trust between patients and health care providers.

Amicus Curiae Doctors of the World-USA ("DOW-USA") is an independent, non-profit, non-sectarian organization working at the intersection of health and human rights. Founded in the United States in 1990 by the late Dr. Jonathan Mann, Doctors of the World is the autonomous U.S. affiliate of Médecins du Monde, the French health and human rights organization. Doctors of the World is part of an international network, whose aim is to provide the world's most vulnerable populations with medical assistance. DOW-USA is dedicated to creating sustainable programs that promote and protect health and human rights in the United States and by providing medical and public health assistance and mentoring to those in greatest need and, within the framework of health care services, contributing to the processes of peace, reconciliation, and human rights.

Amicus Curiae Women's Law Project ("WLP") is a non-profit public interest law firm located in Philadelphia,

Pennsylvania dedicated to advancing the legal and economic status of women and their families. Since its founding in 1974, the WLP has worked to abolish sex discrimination in our laws and institutions through litigation, public policy advocacy, and individual counseling. WLP has a strong interest in stopping states from addressing problems of addiction by punishing women for carrying their pregnancies to term.

Amicus Curiae Finding Common Ground ("FCG") is a collaborative effort between researchers at Columbia University's Mailman School of Public Health and Boston Medical Center. The project is dedicated to developing a public health agenda that integrates the healthcare needs and rights of women and children, and to reframing public discourse so that advocacy for one is seen to benefit both. FCG research focuses on poverty, domestic violence, the impact of welfare reform on reproductive health, and race and ethnicity in regard to the health of women and children.